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IN THE

Supreme Court of the United States

October Term, 1966

No. 489

KINGDOM OF GREECE, MINISTRY OF COMMERCE, PURCHASE DIRECTORATE, *Petitioner*

v.

PETROL SHIPPING CORPORATION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner, the Kingdom of Greece, Ministry of Commerce, Purchase Directorate, respectfully prays that a writ of certiorari issue directed to the opinion and judgment entered on April 21, 1966, by the United States Court of Appeals for the Second Circuit in the above-entitled proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 360 F.2d 103 and is reprinted in Appendix A hereto, p. 1a, *infra*.

The opinion and order of the District Court for the Southern District of New York (Feinberg, J.) is reported at 37 F.R.D. 437 and is reprinted at Appednix B hereto, p. 14a, *infra*.

The earlier panel and *en banc* decisions of the Court of Appeals in this case are reported at 326 F. 2d 117 and 332 F. 2d 370 and are reprinted in Appendix C hereto, p. 20a, *infra*. The original, unreported memorandum decision of the District Court appears in Appendix C hereto at p. 25a, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on April 21, 1966. See p. 13a, *infra*. A petition for rehearing *en banc* was denied on June 22, 1966. This petition for a writ of certiorari was filed within 90 days following that denial. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Has a federal court of appeals power under any provision of law to promulgate its own *ad hoc* rule of *in personam* service for use in a district court proceeding and to apply it retroactively to validate service by ordinary mail on the agency of a foreign government where

(1) *in personam* service of a petition to compel arbitration in accordance with the Federal Rules of Civil Procedure is made mandatory by the United States Arbitration Act; and

(2) there is no provision in the Federal Rules permitting *in personam* service of such a petition upon an agency of a foreign government?

STATUTES AND RULES INVOLVED

Section 4, United States Arbitration Act, 9 U.S.C. § 4:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure . . . .

Title 28, United States Code, Chapter 131—Rules of Court, 28 U.S.C. §§ 2071, 2072:

§2071. *Rule-making power generally*

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

§2072. *Rules of civil procedure for district courts*

> The Supreme Court shall have the power to prescribe, by general rules, the forms of process,

writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

Rule 4(d), Federal Rules of Civil Procedure:

(d) SUMMONS: PERSONAL SERVICE. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

* * * * * * * * *

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

* * * * * * * * *

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

* * * * * * * * *

Rule 83, Federal Rules of Civil Procedure:

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not in-

consistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

* * * * * * * * *

STATEMENT OF THE CASE

The petitioner herein is the Kingdom of Greece, appearing specially through the Greek Ambassador to the United States. The Kingdom of Greece seeks review of the judgment below directing it and the Purchase Directorate of its Ministry of Commerce to proceed to arbitration of a dispute under a charter party.

On or about February 12, 1960, representatives of the Purchase Directorate of the Ministry of Commerce, an official agency of the Greek Government, entered into a written voyage-charter with the respondent Petrol Shipping Corporation, the owner of the tanker *Atlantis*. Pet. App. 15-16.[1] The charter provided for the carriage of a cargo of grain purchased by the Greek Government from the United States pursuant to the Agricultural Trade Development and Assistance Act, 7 U.S.C. §§ 1691-1736.

The charter party contained a standard arbitration clause. That clause provided that should any dispute arise between the parties "the matter in dispute shall

[1] "Pet. App." refers to the petitioner's printed appendix (white cover) filed in the Court of Appeals. "Resp. App." refers to the printed appendix (gray cover) attached to the brief of the respondent Petrol Shipping Corporation filed in the Court of Appeals.

be referred to three persons in New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for purposes of enforcing any award, this agreement may be made a rule of the Court." Pet. App. 16.

In January of 1963, the respondent shipowner filed in the federal district court for the Southern District of New York a petition to compel arbitration of a dispute under the foregoing charter party. Pet. App. 15-17. This petition was filed pursuant to § 4 of the United States Arbitration Act, 9 U.S.C. § 4. It asserted that the Greek Government had declined to arbitrate a dispute relative to responsibility for damages allegedly sustained by the *Atlantis* while unloading its cargo at a berth designated by the Greek Government at Piraeus, Greece. The respondent shipowner prayed for an order directing the Greek Government "to proceed to arbitration in accordance with the terms of its written agreement." Pet. App. 17.

Copies of this petition to compel arbitration, annexed to notices of a hearing on a motion for an order directing the Kingdom of Greece to proceed to arbitration, were mailed by one Lillian F. Clark, described only as being "over the age of eighteen years." Pet. App. 19-21. According to her "affidavits of service by mail," she "served" the notices of motion and the annexed petitions on January 10, 1963, by depositing copies thereof, "securely enclosed in a post-paid wrapper," in a regular United States postal box directed to the following:

> (1) The Ministry of Commerce, State Purchase Directorate, c/o Greek Government, For-

eign Trade Administration, 2211 Massachusetts Avenue, N.W., Washington, D. C.

(2) The Kingdom of Greece, Ministry of Commerce, Purchase Directorate, 30 Rockefeller Plaza, New York 20, New York.

(3) Messrs. Becker & Greenwald, described as "the proctors for the Kingdom of Greece, Ministry of Commerce, Purchase Directorate," 839 17th Street, N.W., Washington 6, D. C.[2]

Following this so-called "service" the Greek Ambassador, appearing specially in the District Court, suggested want of jurisdiction to sue the Kingdom of Greece *in personam* without its consent. Pet. App. 22-23. On February 21, 1963, District Judge Dawson dismissed the petition to compel arbitration, stating in a memorandum decision (See pp. 25a-27a, *infra*) that:

> "If the Government of Greece is ready to proceed with the arbitration there is no occasion for this Court to direct them to arbitrate. If it is not ready to proceed to arbitration, but prefers to rely on its sovereign immunity, there is no jurisdiction in this Court to compel it to act. The motion is denied."

On appeal, a panel of the Second Circuit (Swan, Clark and Marshall, JJ.) affirmed the judgment of the District Court. *Petrol Shipping Corporation* v. *Kingdom of Greece,* 326 F.2d 117 (C.A. 2); Appendix C hereto, p. 21a, *infra.* It did so on the authority of *Puente* v. *Spanish National State,* 116 F.2d 43 (C.A. 2), *cert. denied,* 314 U.S. 627. Circuit Judge Clark

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[2] The respondent shipowner has never contended, and the courts below did not hold, that the law firm of Becker & Greenwald was authorized to accept service for the Kingdom of Greece or any agency thereof.

dissented, urging that the case be reversed and remanded for ascertainment of the State Department's position as to the claim of sovereign immunity. 326 F.2d at 118.

On March 12, 1964, the Second Circuit granted the respondent shipowner's petition for rehearing *en banc* without further oral argument; and it requested the United States to file a brief *amicus curiae,* with permission given the parties to file further briefs in light thereof. Pet. App. 31. Following the submission of such briefs, the Second Circuit, sitting *en banc,* entered the following *per curiam* (332 F.2d 370; Appendix C hereto, pp. 20a-21a):

> "Upon consideration of the brief filed by the United States as *amicus curiae* on the rehearing *en banc* at the request of the Court and the additional briefs of the parties, the Court considers further development of the facts to be desirable before disposition of the important issues of law that have been raised. To that end, we alter the decision of the panel, 326 F.2d 117 (2 Cir. 1964), vacate the judgment of the District Court dismissing the petition, and remand the case to the District Court with instructions to take such evidence as is relevant to the contentions of the parties and to make a further determination in the light thereof and the arguments made thereon by the parties and, if the District Court deems desirable, by the United States. The costs of this appeal will abide the ultimate determination."[3]

The case was accordingly remanded to the District Court for further proceedings, which were conducted

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[3] Circuit Judge Swan did not participate in this *per curiam* decision and Circuit Judge Marshall stated: "I dissent and would adhere to the decision of the panel." See p. 21a, *infra.*

by District Judge Feinberg following the death of Judge Dawson. At the hearing before Judge Feinberg on October 29, 1964, counsel for the parties entered into a stipulation regarding the aforementioned manner in which the petition to compel arbitration and the notice of motions had purportedly been served upon the Ministry of Commerce, Becker & Greenwald, and the Kingdom of Greece. Pet. App. 36. It was further agreed that the following documents would be among those entered on the record by the respondent shipowner (Pet. App. 27-28):

(1) A letter from the Greek Ambassador to the Secretary of State, dated September 30, 1964, enclosing a memorandum requesting that the Department of State express to the District Court its recognition of the Greek Government's claim of sovereign immunity in this action. Resp. App. 1a-5a. The memorandum contained the additional request that the Department of State inform the District Court "that personal service of process of a United States Court cannot be made upon the Kingdom of Greece by mailing copies thereof to the diplomatic or other representatives of the Kingdom of Greece." Resp. App. 4a.

(2) The reply from the Secretary of State, addressed to the Charge d'Affaires ad interim of Greece. Resp. App. 6a-11a. Making reference to and attaching a copy of the so-called Tate Letter, this reply stated that application of the policy of the Tate Letter compelled the Department to conclude "that the acts on which the suit is based are private acts *(jure questionis)*" and hence that the Department could not comply with the Ambassador's request for recognition of sovereign immunity from suit in the instant case. Resp. App. 62-7a. The reply concluded by the following reference to the question of personal service and other matters raised by the Ambassador: "It follows that

the other questions raised by the Memorandum attached to the Ambassador's note are matters for the Court." Resp. App. 7a.[4]

In the meantime and prior to the final determination by the District Court, the Second Circuit (Smith, Kaufman and Marshall, JJ.) rendered its decision in *Victory Transport, Inc.* v. *Comisaria General de Abastecimientos y Transportes,* 336 F. 2d 354, *cert. denied,* 381 U.S. 934. In that case the Second Circuit sustained an order under the United States Arbitration Act directing an agency of the sovereign Government of Spain to arbitrate a charter party dispute. It upheld *in personam* service of the petition to compel arbitration by reference to two provisions of Rule 4 of the Federal Rules of Civil Procedure:[5]

(1) Analogizing foreign sovereign agencies engaging in commercial transactions to ordinary nongovernmental foreign corporations, the court held that service was adequate under the provisions of Rule 4(d) (3) and (7), dealing with service on foreign corporations and associations; and

(2) The court further held that service had been sufficient under Rule 4(e), since there had been a court order authorizing service by registered mail.

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[4] Also introduced into the record by the respondent shipowner were copies of its counsel's letter to the Legal Adviser of the State Department, setting forth its views of the dispute, and the Legal Adviser's reply thereto, stating that the Department had declined to recognize the sovereign immunity claim in this instance. Resp. App. 12a-15a.

[5] Service of the petition to compel arbitration in the *Victory Transport* case took the form of sending the petition and notice by registered mail from the petitioning shipowner to the official Spanish agency, the Comisaria General, at its home office in Madrid, Spain. A court order purportedly authorized this form of service.

In the instant proceeding, District Judge Feinberg felt himself bound in all respects, including the problem of *in personam* service, by the *Victory Transport* decision of the Court of Appeals. See Pet. App. 3-12, and Appendix B hereto, p. 14a, *infra*. He accordingly granted the respondent's motion to compel the Kingdom of Greece to proceed to arbitration.

The Kingdom of Greece duly noted an appeal to the Second Circuit from the order granting that motion. The matter was then heard by a panel composed of Chief Judge Lumbard and Circuit Judges Friendly and Smith. On April 21, 1966, that panel affirmed the District Court's order. Appendix A hereto, p. 1a, *infra*. The opinion was written by Circuit Judge Smith, the author of the opinion in the prior *Victory Transport* case.

Significantly, however, the opinion in this case completely repudiated the *Victory Transport* rationale of service. Whereas the *Victory Transport* opinion had analogized a foreign sovereign engaged in a commercial transaction to an ordinary foreign corporation and had then justified service on the sovereign under Rule 4(d) (3) and (7), the opinion in this case rejected that analogy. It found that the Purchase Directorate is "essentially merely an agency of the Greek government" (p. 7a, *infra)* and as such is not among the parties described in Rule 4(d) (1) or (3), thereby making Rule 4(d) (7) inapplicable as well (p. 6a, *infra)*. The court then concluded that no provision of Rule 4 covers a foreign sovereign or an agency thereof, that "Neither Rule 4(d) (3), nor any other part of Rule 4, provides for service on such a party." See p. 7a, *infra*. The court further found no provision in New York state law or in the local federal court rules of the

Southern District of New York that would permit the kind of service here attempted on an agency of a foreign sovereign.

In the absence of any such provision for service in Federal Civil Rule 4 or in other court rules, the Second Circuit proceeded to fashion its own *ad hoc* rule, giving retroactive approval to the service by ordinary mail that the respondent shipowner had effectuated upon the Purchase Directorate's office in New York City. It did so, at least in part, by reference to Rule 83 of the Federal Rules of Civil Procedure, but stated that if, "for some reason, that part of Rule 83 authorizing *ad hoc* rules could not be used, then the court may fashion a rule outside the Federal Rules altogether, although this really amounts to the same thing as the *ad hoc* provisions of Rule 83." See p. 8a, *infra*.

The acknowledged omission of any provision in Rule 4 for service on a foreign sovereign agency was held not "to manifest a policy that no *in personam* actions against foreign sovereigns could ever be brought" but rather to reflect the fact "that legislators and rule-makers have failed to catch up on their procedural provisions with the more substantive developments in this field of law [restricting immunity of foreign governments to public or sovereign acts]." See pp. 10a-11a, *infra*. Hence the court concluded that there was a need for judicial formulation of a rule permitting such *in personam* service.

A petition for rehearing *en banc*, directed solely to the question of the power of the Court of Appeals to promulgate such an *ad hoc* retroactive rule of service, was summarily denied.

REASONS FOR GRANTING THE WRIT

The decision below is unprecedented in several respects. For the first time, a federal court of appeals has asserted and then exercised the power, heretofore thought to reside exclusively in this Court, to promulgate a rule for *in personam* service of process for use in a federal district court action. For the first time, a federal court of appeals has sought, upon an *ad hoc* and retroactive basis, to permit *in personam* service upon a foreign sovereign. And it has done all this on the premise that there is a need, which it can meet, to remedy a *casus omissus* in the Federal Rules of Civil Procedure.

The significant questions created by this unique decision are manifold. They directly concern the administration of the federal court system in general and the Federal Rules of Civil Procedure in particular. They also concern and possibly may affect the foreign relations of the United States; permitting *in personam* service upon the representatives of a foreign sovereign is fraught with international repercussions and potential impairment of diplomatic functions. Left unexamined and unanswered by this Court, these questions may plague and confound both the federal court system and our relationships with foreign sovereigns. Since the ruling below reflects not only confusion within the Second Circuit itself but inconsistency with the pertinent statutes and rules, the relevant principles established by this Court, and the decisions in point reached by other federal courts and judges, the grant of certiorari becomes most appropriate and compelling.

A. THE PROMULGATION BY THE COURT OF APPEALS OF AN AD HOC, RETROACTIVE RULE FOR IN PERSONAM SERVICE OF PROCESS IN A DISTRICT COURT ACTION IS IN DIRECT CONFLICT WITH THE RULES ENABLING ACT AND WITH THE PRINCIPLES OF MINER v. ATLASS, 363 U.S. 641.

The court below properly acknowledged the necessity of *in personam* service of a petition to compel arbitration pursuant to the United States Arbitration Act. Not only is such service essential to the exercise of a federal court's jurisdiction to adjudicate a suit *in personam*, see *Employers Reinsurance Corp.* v. *Bryant*, 299 U.S. 374, 382; *Ex parte Peru*, 318 U.S. 578, 587, but Section 4 of the Arbitration Act expressly requires that service of a petition thereunder "shall be made in the manner provided by the Federal Rules of Civil Procedure." Thus the service provisions of Rule 4 of those Federal Rules are controlling in this instance.[6]

The court below further acknowledged, contrary to its prior view in the *Victory Transport* case, 336 F.2d at 364, that there is no provision in Rule 4 which deals with or permits service *in personam* upon an agency of a foreign sovereign, whatever the nature of the cause of action. It expressly abandoned its *Victory Transport* rationale that a commercial branch of a foreign sovereign is sufficiently akin to an ordinary nongovernmental foreign corporation to permit service on the agency of the sovereign pursuant to Rules 4(d) (3) and 4(d) (7). The view of the court now is

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[6] Since the Arbitration Act requires compliance with the service provisions of Rule 4, it can be said that the Arbitration Act encompasses Rule 4 as written and promulgated by this Court pursuant to the Rules Enabling Act, 28 U.S.C. §2072. There is no basis for assuming that the Arbitration Act also means to include service of a petition pursuant to some other rule—not a part of Rule 4 as written—promulgated by a federal court of appeals.

that such an analogy is improper and that such a branch must be viewed as an agency of the sovereign. And the court has now found no provision in the local court rules or in the New York state practice, as incorporated in Rule 4(d) (7), which permits service in the manner here attempted. In short, the petitioner herein was found to be "essentially merely an agency of the Greek government" and "Neither Rule 4(d) (3), nor any other part of Rule 4, provides for service on such a party." Appendix A hereto, p. 7a, *infra.*

Faced with what it called "a *casus omissus* both in the Federal Rules and in New York law," p. 10a, *infra,* the court below proceeded to the self-appointed task of fashioning and promulgating a new *ad hoc* rule of *in personam* service.[7] It did so by giving retroactive sanction to one of respondent's three mailings—*i.e.,* the posting, by ordinary mail, of a copy of the petition to compel arbitration directed to the Greek Purchase Directorate's office in New York City. In the court's words, p. 11a, *infra.* "We hold only that service on the branch which is a party to the contract sued on is sufficient." In so holding, the court below has created the following conflicts and problems:

(1) The Conflict with the Rules Enabling Act

The provisions of the Rules Enabling Act, 28 U.S.C. § 2072, directly belie the assertion by a federal court of appeals of power to fashion a new rule of *in personam*

[7] None of the parties urged the Court of Appeals to consider or adopt a new rule of service; nor was any opportunity afforded the parties to comment upon or to present their views as to the propriety or legality of the new rule that was adopted. The District Court, of course, had made no effort to formulate or promulgate a new rule, merely relying upon the now-abandoned service rationale of the *Victory Transport* decision.

service for use in federal district court actions—even when that assertion is limited to the promulgation of rules "not inconsistent with the Federal Rules" and "consistent with common law principles." See pp. 8a-9a, *infra*. That Act plainly states that "The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions." No other federal courts, and certainly not the courts of appeals, are delegated this rule-making power respecting civil actions brought in federal district courts.

That the prescribing of rules of service in district court civil actions comes within the Rules Enabling Act and hence within this Court's exclusive authority is plain from the decision in *Hanna* v. *Plumer*, 380 U.S. 460, 464. The Court there held that "[p]rescribing the manner in which a defendant is to be notified that a suit has been instituted against him . . . relates to the 'practice and procedure of the district courts' " within the meaning of that Act; and the service provisions of Rule 4(d) (1), which had been duly promulgated by this Court, were held authorized by the Act. It would follow that this Court, and only this Court, can authorize a new rule of *in personam* service to supplement Rule 4 or to cure an omission therein. Such a determination of who may be served, and in what manner, concerns rules "which by law it is the duty of this Court to formulate and put in force." *Los Angeles Brush Corp.* v. *James*, 272 U.S. 701, 706. Only this Court can "formulate the necessary guidelines in this area." *Schlagenhauf* v. *Holder*, 379 U.S. 104, 112.

The invasion by the Court of Appeals of this Court's rule-making prerogative is in no way blunted by the

references in the opinion below to Rule 83 or to common law principles. Rule 83 deals only with certain residual rule-making powers of federal district courts for use in their proceedings; it does not purport to authorize or recognize any such power in the courts of appeals.[8] At most, Rule 83 concerns itself with the power of district courts—acting either through the adoption by a majority of the judges of formal rules reported to this Court or through the entry of procedural orders in individual cases—to fill in certain procedural details and minutiae within the framework of the Federal Rules.[9] See *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633, fn. 8 (district court order dismissing complaint for failure to prosecute); *In re United Corp.*, 283 F. 2d 593 (C.A. 3), cited by the court below, p. 8a, *infra* (district court order fixing time limit for filing objections). Since the District Court in this proceeding did not seek to invoke its power under Rule 83 and since that Rule gives no

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[8] Rule 83 provides: "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

The original Advisory Committee which drafted Rule 83 eliminated from its final report to this Court an alternative provision which would have required the concurrence of a majority of the respective circuit judges in any rule adopted by a district court under Rule 83. Moore's Federal Practice, Vol. 7, ¶83.02, p. 4702 (2nd ed., 1955).

[9] "It is not thought . . . that Rule 83 was intended to cover anything other than procedural details and matters overlooked in preparing the rules." Green, *The Admissibility of Evidence Under the Federal Rules*, 55 Harv. L. Rev. 197, 206 (1941).

independent authority to the Court of Appeals to act on behalf of the District Court or to promulgate its own rule, Rule 83 can give no cloak of legal propriety to the rule of service announced below.

Nor do the common law principles and authorities cited by the court below, pp. 8a-9a, *infra,* provide support for the rule-making power asserted in this case. Such decisions as *Story* v. *Livingston,* 13 Peters 359, and *Barrow S.S. Co.* v. *Kane,* 170 U.S. 100, long antedate the adoption of the Federal Rules of Civil Procedure. And their references to common law rules of jurisprudence and the practice of the high court of chancery in England have no relevance whatever in determining whether a particular federal court has any rule-making function under the Rules Enabling Act with respect to the modern-day Federal Rules.

This Court's exclusive power to formulate and promulgate rules of practice for use in district court actions has never before been challenged or even questioned. From the very birth of the Federal Rules of Civil Procedure it has been said that "The power of the Supreme Court to amend the new rules seems conceded by all." *United States* v. *Adler's Creamery,* 107 F.2d 987, 992, fn. 2 (C.A. 2, Clark, J.); and see Moore's Federal Practice, Vol. 7, ¶86.04 (2nd ed., 1955). Now the court below has asserted its own independent authority to formulate and sanction new *ad hoc* rules of service in situations where the Federal Rules are silent. If that assertion is left unchecked, a precedent will have been established for federal courts of appeals to attempt to cure whatever they feel may be defects or omissions in any of the Federal Rules. The power asserted below is not only a power to amend the service provisions of Rule 4 but also a power to amend the pro-

visions of any other Federal Rule. If sustained, such power could soon destroy the symmetry and uniformity of the Federal Rules. What might be considered proper service on a foreign sovereign in the Second Circuit might be (as it is) improper in the Seventh Circuit; conflicting rules would soon appear in this and in other areas of district court practice and procedure.

The grant of certiorari thus becomes imperative in order to give effect to the Rules Enabling Act and its grant of exclusive authority to this Court to prescribe, amend or supplement the basic rules of practice and procedure of the district courts. The statutory guidelines as to the rule-making powers of the federal courts are in urgent need of clarification and restatement if the Federal Rules of Civil Procedure are to be maintained on a uniform and cohesive basis.[10]

(2) The Conflict with Miner v. Atlass

The promulgation by the court below of a rule of service not provided by Rule 4 of the Federal Rules is directly contrary to the rule-making principles established by this Court in *Miner* v. *Atlass*, 363 U.S. 641. That conflict serves to heighten the appropriateness of the grant of certiorari in this case.

This Court held in *Miner* that a local rule of a federal district court, purporting to authorize the taking of depositions in admiralty actions, was invalid in light of the failure of this Court's General Admiralty Rules specifically to authorize such depositions. Expressly re-

[10] No question is raised in this case as to the power of a federal court of appeals to prescribe rules for the conduct of its own business. Congress has expressly given the courts of appeals that power. 28 U.S.C. §2071, entitled "Rule-making power generally." The rule promulgated in this instance, of course, was not in exercise of that power.

jected was the claim that a court of admiralty has inherent power, not dependent on any statute or rule, to order the taking of such depositions; and the local court rule which sought to authorize the depositions was held not to be a valid exercise of that court's power to regulate local practice. This Court viewed the problem of deposition taking in admiralty cases as a weighty and complex one in a field of federal jurisdiction "where nationwide uniformity has traditionally been highly esteemed." 363 U.S. at 650. In that setting, the Court said:

> "The problem then is one which peculiarly calls for exacting observance of the statutory procedures surrounding the rule-making powers of this Court, see 28 U.S.C. § 331 (advisory function of Judicial Conference), 28 U.S.C. § 2073 (prior report of proposed rule to Congress), designed to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords. Having already concluded that the discovery-deposition procedure is not authorized by the General Admiralty Rules themselves, we should hesitate to construe General Rule 44 as permitting a change so basic as this to be effectuated through the local rule-making power, especially when that course was never reported to Congress as would now be required under 28 U.S.C. § 2073." 363 U.S. at 650.

In this case, as in *Miner* v. *Atlass,* the making of a rule respecting *in personam* service upon a foreign sovereign or an agency thereof is one of those "basic procedural innovations" that are peculiarly within the exclusive competence of this Court. It may well be that the framers of Rule 4, including this Court, thought it

unwise to make provision for service upon a foreign sovereign, particularly in view of the international implications. But whatever the reason for the omission, the problem is so complex and international in scope and so demanding of uniformity of answer as to permit a rule of service to be formulated only after "exacting observance of the statutory procedures surrounding the rule-making powers of the Court" and only after "mature consideration of informed opinion from all relevant quarters." See also *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 424 (referring to this Court as the "federal authority" for resolving judicial problems "uniquely federal in nature").

Miner v. *Atlass* has further relevance here in its hesitancy to construe General Rule 44 (permitting district courts to make rules of practice not inconsistent with the General Rules) "as permitting a change so basic as this to be effectuated through the local rule-making power, especially when that course was never reported to Congress . . ." By the same token, one should hesitate to construe Rule 83 of the Federal Rules (permitting district courts to make rules of practice not inconsistent with the Federal Rules) as permitting so basic an innovation as *in personam* service on foreign sovereigns and their agencies. And that hesitancy should extend as well to any other supposed source of power, be it the common law or inherent authority, for promulgating the rule announced below. When a problem, such as service on foreign sovereigns, has great complexity and manifold implications, when the need for uniformity of treatment of the problem is manifest, *Miner* v. *Atlass* teaches that lower court rule-making powers are not to be construed as encompassing such a problem.

Moreover, any real or imagined need for the rule of service here in question cannot suffice as the source of a lower court's promulgating authority or as the basis for rejecting the mandate of the Rules Enabling Act or the principles of *Miner* v. *Atlass*. The court below expressed the thought that there is now greater occasion to sue foreign sovereigns and effectuate service upon them than when the Federal Rules were originally adopted and that the rule-makers have simply neglected to keep procedural pace with the substantive developments which purportedly permit such suits.[11]

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[11] The court below said (p. 11a, *infra*) that the recent trend toward restricting the sovereign immunity concept to public or sovereign acts, thereby permitting suits against sovereigns on commercial causes of action, has augmented the occasion for making service on such sovereigns. In the court's view (pp. 10a-11a, *infra*), the failure of Rule 4 to make provision for such service "cannot reasonably be considered to manifest a policy that no *in personam* actions against foreign sovereigns could ever be brought" but rather reflects the fact that "legislators and rule-makers have failed to catch up in their procedural provisions with the more substantive developments in this field of law."

But it is questionable if any court other than the Second Circuit has accepted the restrictive theory of sovereign immunity or has permitted *in personam* suits against foreign sovereigns without their consent on commercial causes of action. The Second Circuit has endorsed the restrictive theory in this and in the *Victory Transport* case—which the Solicitor General has described as "the first clear-cut departure by an American federal court from the so-called absolute theory of sovereign immunity upheld in *Berizzi Bros. Co.* v. *S. S. Pesaro*, 271 U.S. 562 . . . [and] apparently the only federal case to uphold an *in personam* action against an objecting foreign sovereign or its unincorporated agency or department." Memorandum for the United States as Amicus Curiae, p. 7, *Comisaria General* v. *Victory Transport Incorporated*, No. 815, Oct. Term 1964, *cert. denied*, 381 U.S. 934.

Thus the so-called need for the rule of service in question springs only from the suits to compel arbitration brought in this case and in the *Victory Transport* case. No other court has indicated or suggested such a need. Cf. *Purdy Co.* v. *Argentina*, 333 F.2d 95 (C.A. 7), *cert. denied*, 379 U.S. 962.

But neither Congress nor this Court has recognized that a court of appeals can respond to such a need, if there be one, by promulgation of a rule of service. That is precisely the kind of problem entrusted to this Court by the Rules Enabling Act.

And even if there be a need for promulgating such a rule of service, the problems and the implications of the rule are not confined to litigation arising in the Southern District of New York or in the Second Circuit. The national and international implications are such as to demand mature consideration of informed opinion from all relevant quarters; if a rule of service on foreign sovereigns then be deemed appropriate, the rule would need nationwide promulgation to assure uniformity of treatment of foreign sovereigns in federal courts. The problem does not lend itself to case-by-case or Circuit-by-Circuit development.

There thus exists a pressing occasion to clarify the areas of rule-making authority which are within the exclusive ambit of this Court, making plain the boundaries over which courts of appeals may not step. Only by such a clarification can the proper administration of the rules of practice and procedure in federal district courts be kept exclusively in the hands of this Court.

B. THE DECISION BELOW AS TO THE EFFECT OF RULE 4's FAILURE TO PROVIDE FOR SERVICE ON A FOREIGN SOVEREIGN IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUIT AND DISTRICT COURTS.

The concession by the court below that no provision of Rule 4 authorizes personal service upon a foreign sovereign agency, even when sued on a commercial cause of action, is confirmed by the decisions of other federal courts. The Seventh Circuit, in *Purdy Co.* v. *Argentina,* 333 F. 2d 95, 97, *cert. denied,* 379 U.S. 962,

held that "Rule 4 of the Federal Rules makes no provision for service upon a foreign government"—even where, as in *Purdy,* the foreign government is sued on a commercial sales transaction. See also *Oster* v. *Dominion of Canada,* 144 F. Supp. 746 (N.D.N.Y.), *aff'd per curiam,* 238 F.2d 400 (C.A.2), *cert. denied,* 353 U.S. 936; *Berlanti Const. Co.* v. *Republic of Cuba,* 190 F. Supp. 126 (S.D.N.Y.).[12]

That conclusion has also been acknowledged by the United States Government, speaking through a Department of Justice brief filed in the Court of Appeals for the District of Columbia Circuit in *Hellenic Lines, Ltd.* v. *Moore,* 345 F. 2d 978.[13] In its Supplemental Brief in that case, the Government stated (pp. 5-6):

> "The Federal Rules of Civil Procedure, as they presently stand, make no provision for the service

[12] The *Oster* case held that there is no precedent under the Federal Rules for personal service on a foreign sovereign's agent and that no other authority exists for such service. The *Berlanti* case held that personal service in Havana upon the Minister of the Presidency of Cuba is invalid under Rule 4(d)(7).

[13] The court in *Hellenic Lines* refused to mandamus a federal marshal to serve a personal summons upon the ambassador of a foreign sovereignty that had been sued in the District of Columbia upon a contract executed by a commercial branch thereof. In his concurring opinion, 345 F. 2d at 983, fn. 7, Circuit Judge Washington wrote:

> "It is to be observed that a sovereign state has rarely been named as defendant or respondent, in suits brought in courts of this country for a money judgment against that state, as distinguished from suits based upon a seizure of property in this country claimed by the state, or counterclaims interposed after the foreign state has invoked a court's jurisdiction. So far as I am advised jurisdiction in such a suit has never been successfully obtained."

Among the cases cited in support of that statement were the Seventh Circuit's *Purdy* decision, as well as the *Oster* case.

of process on foreign sovereign entities. In our research of the original and subsequent commentaries of the Advisory Committee on Civil Rules we have found no reference to adjective law issues raised when attempts are made to sue foreign states in municipal courts. No discussion by commentators has been found. The conclusion that the draftsmen of the Rules and the members of the Advisory Committee did not contemplate suits against foreign governments is inescapable.

"The dilemma which the appellant, and others similarly situated, faces cannot be remedied by a strained reading of the existing Rules, or the judicial imposition of novel tasks upon the Department of State which—quite aside from the doctrine of separation of powers—that Department is ill-equipped to carry out. The legal vacuum in this area will have to be filled, if at all, by specific legislation."

There is thus uniformity of opinion respecting the absence of any provision in Rule 4 for *in personam* service on a foreign sovereign or its agency. Where the Second Circuit is in conflict with the foregoing Circuit and District Court decisions, however, is in its formulation of its own *ad hoc* rule of service to remedy the conceded omission. Neither the Seventh Circuit in *Purdy* nor the District of Columbia Circuit in *Hellenic Lines,* once it became clear that there is no provision in the Federal Rules for permitting *in personam* service on a foreign sovereign, considered it appropriate to fashion an *ad hoc* rule of service to fit the situation at hand. Those courts, like the courts in *Oster* and *Berlanti,* felt themselves bound to respect Rule 4 as it is written, given effect to its omission with respect to foreign sovereigns.

The court below expressly stated (p. 11a, *infra*) that it was "not disposed to follow" the *Purdy* or the *Oster* rulings "to the extent they hold that a sovereign cannot be served in federal court."[14] There is thus an unresolved conflict, justifying the exercise of this Court's review powers, as to whether federal courts must take Rule 4 as it is written or whether they are free to write in an additional provision with respect to service of process.

C. THE DECISION BELOW CREATES CONFUSION AND POTENTIAL DIFFICULTIES BOTH IN THE ADMINISTRATION OF THE FEDERAL RULES AND IN OUR RELATIONSHIPS WITH FOREIGN SOVEREIGNS.

Apart from the important questions as to the power of the court below to promulgate the service rule in question, the decision below raises significant questions concerning the administration of the Federal Rules generally and concerning American relationships with foreign sovereigns. These questions are deserving of fullest consideration by this Court.

(1) The absence of any power in a panel of a Court of Appeals to promulgate a new rule of service in supplementation of Rule 4 is obvious; only this Court can perform such a function. But even assuming that an appellate panel had such power, should such a rule be promulgated on an *ad hoc* and retroactive basis? Are not the Federal Rules generally, and Rule 4 in particular, meant to be of a uniform and general nature, rather than created and applied on an *ad hoc* basis? Is serv-

[14] The court below, citing the District of Columbia Circuit's ruling in *Hellenic Lines*, stated that it did not mean "to say that service on the sovereign might be effected on any representative of the sovereign." See p. 11a, *infra*. But the *Hellenic Lines* opinion did not intimate, let alone formulate a rule, that service on a representative of a foreign sovereign could be effectuated in any manner under the Federal Rules.

ice of process really a detail or minutiae of local court practice within the scope of Rule 83? And has the court below, while finding "no compelling reason why the court must fashion the rule in advance," given any "compelling reason" for not following its own dictum that "the better practice in a case such as this might be to secure an advance ruling, approving a given method of service"? See p. 8a, *infra*. These are questions that must be answered by this Court before any possible sanctioning of the result reached below.

(2) Will the rule promulgated below, authorizing *in personam* service on a foreign sovereign agency, complicate or embarrass the conduct of our foreign relationships or invite retaliation from foreign courts with respect to agencies of the United States operating abroad? The court below gave no heed to that significant question; it made no effort to secure the advice of the Department of State or other governmental agencies as to the advisability of adopting the rule in question.[15] *Cf. Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 980 (App. D. C.), rejecting a requested form of personal service on a foreign ambassador after receiving advice from the Department of State that such

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[15] At an earlier stage of this litigation, the Department of State, in reliance on the Tate Letter, declined to advise the District Court that the Kingdom of Greece was entitled to assert a sovereign immunity defense. But, in response to the Greek Ambassador's request that the Department comment on the personal service attempted in this case, the Department replied that such a matter was for the District Court to resolve. Resp. App. 7a. Moreover, the so-called Tate Letter, the 1952 letter from the Acting Legal Adviser of the State Department, respecting non-recognition of sovereign immunity claims where commercial transactions are involved, was not meant "to change the requirements of the Federal Rules of Civil Procedure regarding service." Brief of Department of Justice (p. 20), in *Hellenic Lines, Ltd.* v. *Moore*, 345 F.2d 978 (App. D.C.).

service "would prejudice the United States foreign relations and would probably impair the performance of diplomatic functions."

The very fact that Rule 4 makes no provision for service on a foreign sovereign may well represent the considered view of its framers that the foreign policy implications of such type of service are too dangerous to permit such service to be codified or permitted. If any other conclusion or determination is to be made, it should be arrived at only after consideration of the views of those governmental officials best equipped to evaluate the problems. The failure of the court below to seek such advice makes uncertain whether its conclusion is consistent with the best interests of our Government or of our federal court system.

CONCLUSION

Seldom does a decision present so many serious questions concerning the federal court system and its relationships with foreign sovereign defendants. They are questions which have evoked sharply conflicting views among various panels of the Second Circuit: (1) the *Oster* recognition that there is no provision in the Federal Rules for serving a foreign sovereign; (2) the *Victory Transport* theory that a foreign sovereign engaged in a commercial transaction could be personally served by analogy to an ordinary foreign corporation; and (3) the instant decision, repudiating the *Victory Transport* theory and enunciating the court's own power to provide an *ad hoc* rule of service. And they are questions which other Circuits have avoided by simply giving effect to the silence of Rule 4 as to foreign sovereigns.

But the overriding problem created by the decision below is the direct challenge to this Court's exclusive authority to promulgate changes in the Federal Rules of Civil Procedure. That challenge, in addition to the other reasons detailed here, fully justifies the grant of certiorari.

Respectfully submitted,

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August 26, 1966.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 133—September Term, 1965.

(Argued November 8, 1965 Decided April 21, 1966.)

Docket No. 29935

In Re the Petition

—of—

PETROL SHIPPING CORPORATION, as owner of tanker ATLANTIS, *Petitioner-Appellee,*

for an order directing

THE KINGDOM OF GREECE, MINISTRY OF COMMERCE, PURCHASE DIRECTORATE, *Respondent-Appellant,*

to proceed to arbitration.

Before: LUMBARD, *Chief Judge,* FRIENDLY and SMITH, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, Wilfred Feinberg, *District Judge,* 37 F. R. D. 437, directing respondent to proceed to arbitration, United States Arbitration Act, 9 U.S.C. § 4, despite its plea of sovereign immunity. Affirmed.

ELI ELLIS, New York, N. Y. (Robert W. Mullen, and Hill, Betts, Yamaoka, Freehill & Longcope, New York, N. Y., on the brief), *for petitioner-appellee.*

ARTHUR M. BECKER, New York, N. Y. (Nixon, Mudge, Rose, Guthrie & Alexander, New York, N. Y., on the brief), *for respondent-appellant.*

SMITH, *Circuit Judge:*

Respondent Kingdom appeals from an order of the United States District Court for the Southern District of New York, Wilfred Feinberg, *District Judge,* directing it to proceed to arbitration. We find no error and affirm the order.

Petrol Shipping, as owner of the tanker *Atlantis,* entered into a written charter party with respondent dated February 12, 1960, in New York City, and agreed thereby to transport grain acquired by respondent from the United States government pursuant to an agreement between the two governments. The United States was acting under the Agricultural Trade Development and Assistance Act of 1954, 7 U.S.C. 1691, et seq. The grain was to be shipped from Houston, Texas, and/or Baton Rouge, Louisiana, to Piraeus, Greece.

The shipment apparently had to be transported at least 50% by U. S. flag vessels, of which *Atlantis* is one. See 46 U.S.C. 1241(b). The ship sustained bottom damage at the discharge berth in Piraeus, allegedly due to an unsafe berth, but the charterer disclaimed responsibility. The shipowner alleged damages were about $287,000.

The charter party contained the following arbitration clause:

> Should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men.

By letter of September 29, 1961 the shipowner named its arbitrator, and demanded that the charterer appoint its;

a further demand was made on December 15, 1961. Although respondent said that it had advised its Foreign Trade Administration in Washington to proceed, no arbitrator was named.

On January 14, 1963 Petrol brought this petition in the District Court for the Southern District of New York, under § 4 of the United States Arbitration Act, 9 U.S.C. § 4. Service of process was allegedly effected by ordinary mail to respondent's Ministry of Trade, State Purchase Directorate, Washington; to Becker & Greenwald, described as proctors for the Directorate; and to respondent's ministry of Commerce, Purchase Directorate, New York City.

The charterer appeared specially, and submitted a suggestion of the Greek Ambassador, that as Greece was a friendly sovereign and therefore immune, the court lacked jurisdiction. No advice from the State Department was transmitted to the court. The District Court, Judge Dawson, denied the petition to compel arbitration on February 21, 1963, on the ground of sovereign immunity.

This judgment was affirmed by a panel of this court, 326 F. 2d 117 (2 Cir. 1964), with Judge Clark dissenting, and suggesting the matter should be reversed and remanded to ascertain the position of the State Department. On rehearing *en banc*, 332 F. 2d 370 (2 Cir. 1964), *per curiam*, the United States Department of Justice having submitted an *amicus curiae* brief, the matter was remanded for further development of facts. The case was assigned to Judge Feinberg.

Before the District Court heard the case on remand, a panel of this court decided *Victory Transport, Inc.* v. *Comisaria General de Abastecimientos y Transportes*, 336 F. 2d 354 (2 Cir. 1964), cert. den. 381 U.S. 934 (1965), a case substantially similar in its facts to the present case, holding that a branch of the Spanish Ministry of Com-

merce could be sued without its consent in that suit, and despite its plea of immunity.

On remand in this case, the parties entered into a stipulation in lieu of a hearing, and introduced exhibits, including the Charter Party and certain documents of correspondence with the State Department. These documents were a request by the Greek Ambassador to the State Department for recognition of immunity and a letter from counsel for petitioner to the Legal Advisor of the State Department asking that the Department decline the Ambassador's request, and citing *Victory Transport;* the reply of the State Department, declining to recognize any sovereign immunity in the case, on the ground that the matter was *jure gestionis,* and deferring the Ambassador to the Tate letter; and a reply of the Legal Advisor to counsel for petitioner, noting that the Department had declined to intervene.

The District Court requested an *amicus suriae* brief from the United States, but the government declined, in view of the controlling nature of *Victory Transport.* By opinion of June 4, 1965, the court directed the Kingdom to proceed to arbitration, refusing to recognize any immunity, relying on *Victory Transport.* 37 F. R. D. 437 (S.D.N.Y. 1965). The Kingdom appeals.

The proper theoretical approach to the issues in this case is indicated by the brief of the United States as *amicus curiae* in the rehearing *en banc.* There, at page 17, the brief states,

> the immunity of sovereign did not present a "jurisdictional" defect such as improper service might. Under the Supreme Court's analysis [in *Ex Parte Peru,* 318 U.S. 578 (1943)], it appears that in an action against a sovereign just as in any other suit, jurisdiction must be acquired either by service of process, or by the defendant's appearance in court, or

> *in rem* by seizure and control of property. Only after such jurisdiction is acquired, does the sovereign immunity defense property [sic] come into consideration. Instead of being a "jurisdictional" matter in the same sense as acquiring jurisdiction over a person or property, sovereign immunity presents a ground for relinquishing the jurisdiction previously acquired.

The first issues, then, deal not with immunity, but rather with jurisdiction *in personam* and the adequacy of service

I. JURISDICTION

In *Farr & Co.* v. *Cia Intercontinental de Navigacion,* 243 F. 2d 342 (2 Cir. 1957), this court held that in a suit under the Arbitration Act, where the parties had agreed to arbitrate and that "this submission may be made a rule of court by either party," by agreeing to arbitrate in New York a party "makes himself as amenable to suit as if he were physically present in New York." 243 F. 2d at 347. *Farr* was followed in *Orion S. & T. Co.* v. *Eastern States Petro. Corp. of Panama,* 284 F. 2d 419 (2 Cir. 1960), where the contract read, "for the purpose of enforcing awards this agreement shall be made a Rule of of [sic] Court." Although the suit was to compel arbitration, not to enforce an award, the court concluded that as in *Farr* the parties were as if physically present. We conclude that this states a rule of federal law, under the Arbitration Act.

Here the contract reads, "for the purpose of enforcing any award, this agreement may be made a rule of the Court." This is not appreciably different from the *Orion* contract, and as was said in *Victory Transport,* "the fine distinction" between a submission to enforce an award and a general submission "did not trouble this court in *Orion* . . . Implicit in the agreement to arbitrate is consent to enforcement of that agreement." 336 F. 2d at 363, 4.

The fact that one party is a branch of a foreign sovereign does not affect the conclusion that by entering into an

arbitration agreement containing a submission such as here, the sovereign becomes amenable to suit. The question of immunity does not bear on the question of amenability, or personal jurisdiction. What *Farr* and *Orion* compel is that the Kingdom be treated as if it is physically present.

Moreover, the branch of respondent being sued is actually present. The Purchase Directorate maintains an office in New York, the one served; and it negotiated the charter party in New York, perhaps at that same office. Thus no doctrine of constructive presence by consent is necessary.

II. Service

Regardless, however, of what theory makes the Purchase Directorate present, service must be adequate. Here *Farr* again arguably controls. *Farr* may be read as meaning that an arbitration agreement such as construed there gives consent to service by any method designed to give adequate notice, as well as consent to personal jurisdiction, all as a matter of federal law. In fact, however, *Farr* says that applicable *New York* law is that consent to jurisdiction includes consent to service by any method consistent with due process.

Farr was a suit against a foreign corporation. Once it was held that service was adequate under New York law, that service sufficed in federal court by virtue of Rule 4 (d)(7), Federal Rules of Civil Procedure. But that provision applies only to parties described in Rule 4(d)(1) or (3), and in our view respondent is not one of them.

It is, of course, not an individual, and Rule 4(d)(1) is inapplicable. Rule 4(d)(3) is not a catch-all for categories of parties not otherwise considered in Rule 4. The only entity covered in 4(d)(3) that is remotely like respondent is "other unincorporated assoication which is subject to suit under a common name." Beyond a doubt, if the Purchase Directorate is subject to suit, it may be sued under a common name, because a right under the Arbitration Act

is surely "a substantive right existing under the . . . laws of the United States." Rule 17(b); see *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344 (1922). The only question, then, is whether respondent is an association.

An association ought not to be defined to include an entity which lacks membership; respondent is essentially merely an agency of the Greek government. Neither Rule 4(d)(3), nor any other part of Rule 4, provides for service on such a party. And even if respondent were within Rule 4(d)(3), so that service according to state practice sufficed, since New York does not provide for service on respondent in the manner used here, there would be some difficulty in service.[1]

But the fact that Rule 4 does not provide a method for service on respondent does not mean that no service could be effective. Rule 83 permits "each district court, by a majority of the judges thereof" to "make and amend rules governing its practice not inconsistent with these rules."

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[1] There is no general provision for service on an association because under New York law an unincorporated association may not sue or be sued in its own name, *Kirkman* v. *Westchester Newspapers*, 261 App. Div. 181, 24 N. Y. S. 2d 860 (1st Dept. 1941), *aff'd* 287 N. Y. 373 (1942); *Rosen* v. *Alleghany Corp.*, 133 F. Supp. 858, 867 (S. D. N. Y. 1955), although it may be sued in the name of its president or treasurer, N. Y. General Associations Law, § 13. See Commentary accompanying McKinney's N. Y. C. P. L. R. 311, p. 499.

Rule 4(d)(7) permits service "in the manner prescribed by the law of the state . . . for the service of a summons or other like process upon any such defendant [as appears in Rule 4(d)(3)] in an action brought in the courts of general jurisdiction of that state." For arbitration actions in New York service at the time of this suit was governed by N. Y. C. P. A. § 1450, providing for personal service, substituted service, or service as the court directs, none of which occurred here. Contrast N. Y. C. P. L. R. 403(c), which now governs service in all special proceedings. Since in our view respondent is not within Rule 4(d)(3), we do not decide whether the power to direct proper service under § 1450 subsumed the power to approve service later.

The Rule goes on to say, "in all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules." See also 28 U.S.C. § 2071.

Rule 15 of the Civil Rules of the United States District Courts for the Southern and Eastern Districts of New York says:

> Whenever a procedural question arises which is not covered by the provisions of any statute of the United States, or of the Rules of Civil Procedure, or of the Rules of the United States District Courts for the Eastern and Southern Districts of New York, it shall be determined, if possible, by the parallels or analogies furnished by such statutes and rules. If, however, no such parallels or analogies exist, then the procedure heretofore prevailing in courts of equity of the United States shall be applied, or in default thereof, in the discretion of the court, the procedure which shall then prevail in the Supreme Court or the Surrogates Court as the case may be of the State of New York may be applied.

And when there is no Federal Rule, and no local rule, the court may fashion one not inconsistent with the Federal Rules. Rule 83, *supra;* see *In re United Corp.*, 283 F. 2d 593 (3 Cir. 1960). There is no compelling reason why the court must fashion the rule in advance, although the better practice in a case such as this might be to secure an advance ruling, approving a given method of service.

But if neither service under Rule 4, or under a local rule was available here, and, for some reason, that part of Rule 83 authorizing *ad hoc* rules could not be used, then the court may fashion a rule outside the Federal Rules altogether, although this really amounts to the same thing as the *ad hoc* provisions of Rule 83. *Story* v. *Livingston,* 38 U.S. 196 [13 Peters 359] (1839) arose during the Equity Rules, uni-

form rules governing equity practice in the federal courts, like the Federal Rules today, but unlike the rules governing practice on the law side, which conformed to state practice. In *Story* the court observed:

> We think the occasion, however, a proper one for this court to remark, if any such rule [one abolishing equity] has been made by the district court in Louisiana, that it is in violation of those rules which the Supreme Court of the United States has passed to regulate the practice in the courts of equity of the United States. They are as obligatory upon the courts of the United States in Louisiana, as they are upon all other United States courts; and the only modifications or additions which can be made in them by the circuit or district courts, are such as shall not be inconsistent with the rules prescribed. 38 U.S. at 201.

The court went on to say that where the rules were silent, the lower courts should look to the practice of the high court of chancery in England.

Similarly it was held that where state law did not indicate any rule of practice on the law side to which the federal law court could conform, the court should make its own rule, consistent with common law principles. Thus it was held that where a state had not prescribed a method of service, so that the Conformity Act did not provide the federal court with any method, service according to common law rules sufficed. *Barrow S.S. Co.* v. *Kane,* 170 U.S. 100 (1898); *Kaufman* v. *Garner,* 173 Fed. 550, 554 (W.D. Ky. 1909) ("general principles of jurisprudence").

In our view there is no inconsistency with the Rules in approving service in this case by ordinary mail on the respondent at its address within the state. Since Rule 4 is silent as to respondent, there is no competing method of service authorized by the Rules which may be said to have been intended to be exclusive. And the fact that service here is in a method which the Rules do not adopt directly

for other types of parties is not a compelling distinction; state rules often adopt differing modes of service, and these are used in the federal courts through Rule 4(d)(7).[2]

Since respondent is not one of the parties dealt with in Rule 4(d)(3), our decision in *Arrowsmith* v. *United Press International*, 320 F. 2d 219 (2 Cir. 1963) that whether a foreign corporation has done enough to make it present so that service on it under that Rule and under Rule 4(d)(7) will give jurisdiction is to be determined in the first instance by state law, is not directly in point. Moreover, we do not equate "presence," or amenability to suit, with service of process, as our treatment of these two questions here indicates, and we regard Rule 4 as speaking to service alone, and not both service and amenability. Since, unlike in *Arrowsmith*, where "presence" was not treated at all in the Rules, federal law has partly treated the question of service, in Rule 4, it is appropriate to look to federal law to fill in any gaps in that Rule.

In *Arrowsmith* it was "[o]ur belief that neither the federal legislature nor the federal rule-makers have had any intention to displace state statutes as to the taking of jurisdiction over foreign corporations in ordinary diversity cases . . ." 320 F. 2d at 227. We deal here with a *casus omissus* both in the Federal Rules and in New York law. The absence of provision in either as to the manner of serving a foreign government cannot reasonably be considered to manifest a policy that no *in personam* actions against foreign sovereigns could ever be brought. It reflects rather that until the treaties and declarations of the decade beginning in 1948, restricting immunity of foreign

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[2] We do not base our decision on the question of service on the argument that the making of the Charter Party with the New York Commercial Men's arbitration clause and the actual presence of respondent's Purchase Directorate amounted to a consent to service in any manner consistent with due process. Contrast *Farr & Co.* v. *Cia Intercontinental de Navigacion, supra,* where constructive presence operated to give consent to service.

governments to public or sovereign acts, see *Victory Transport, Inc., supra,* 336 F. 2d at 357-8, there was no occasion to make provision for service upon them, and that legislators and rule-makers have failed to catch up in their procedural provisions with the more substantive developments in this field of law. Moreover, in sharp contrast to diversity actions against foreign corporations, the fashioning of provisions with respect to service on foreign governments is a task peculiarly appropriate for federal courts. Compare *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 423-7 (1964).

In the light of the above, we are not disposed to follow *Oster* v. *Dominion of Canada,* 144 F. Supp. 746 (N.D. N.Y.), aff'd 238 F. 2d 400 (2 Cir. 1956), cert. den. 353 U.S. 936 (1957),[3] or *Purdy Co.* v. *Argentina,* 333 F. 2d 95 (7 Cir. 1964), cert. den. 379 U.S. 962 (1965), to the extent they hold that a sovereign cannot be served in federal court. See also *Berlanti Const. Co.* v. *Republic of Cuba,* 190 F. Supp. 126 (S.D.N.Y. 1960), where personal service in Havana, Cuba, on the Minister of the Presidency of the Republic of Cuba, was held invalid under Rule 4(d)(7).

This is not to say that service on the sovereign may be effected on any representative of the sovereign. See *Hellenic Lines, Ltd.* v. *Moore,* 345 F. 2d 978 (D.C. Cir. 1965). We hold only that service on the branch which is a party to the contract sued on is sufficient.

Finally, it has not been suggested, nor do we believe, that the service here was inconsistent with due process.

---

[3] The court in *Oster* relied on *Clark County, Nev.* v. *City of Los Angeles,* 92 F. Supp. 28 (D. Nev. 1950), for the proposition that there is no authority for service of process in a manner other than is set forth in the Federal Rules. But in *Clark,* suit was against a municipal corporation, a category of defendant service on which is covered by the Rules. Rule 4(d)(6). That method, of course, is exclusive; but the case is not authority for the holding in *Oster,* since the Rules are silent as to the category of defendant there.

III. Immunity

On the question of sovereign immunity this case is identical to *Victory Transport, Inc., supra,* p. 1668. There this court held that the claim of sovereign immunity would be denied when made by a branch of the Spanish Ministry of Commerce which entered into a voyage charter containing the same arbitration clause as here, for the transport of wheat purchased under the Agricultural Trade Development and Assistance Act, as here. Suit was to compel arbitration.

Moreover, although in *Victory Transport, Inc.* there had been no advice from the State Department to the court, here there is in evidence the letter from the Department to the Kingdom's representative, rejecting the claim of sovereign immunity, on the ground that "the acts on which the suit is brought are private acts (jure gestionis)," and appending the Tate letter adopting the restrictive theory of sovereignty.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of April, one thousand nine hundred and sixty-six.

Present: HON. J. EDWARD LUMBARD, *Chief Judge*, HON. HENRY J. FRIENDLY, HON. J. JOSEPH SMITH, *Circuit Judges*.

In Re the Petition of

PETROL SHIPPING CORPORATION, as owner of TANKER ATLANTIS, *Petitioner-Appellee*,

v.

THE KINGDOM OF GREECE, MINISTRY OF COMMERCE, PURCHASE DIRECTORATE, *Respondent-Appellant*.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to the appellee.

A. DANIEL FUSARO
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

FEINBERG, *D. J.*

This case is before the court after remand from the Court of Appeals for the Second Circuit. Petitioner Petrol Shipping Corporation, owner of the tanker "Atlantis," seeks an order compelling respondent, the Kingdom of Greece, Ministry of Commerce, Purchase Directorate, to proceed to arbitration. Petitioner and respondent were parties to a charter party, dated February 12, 1960, by which the tanker "Atlantis" was chartered for the carriage of a cargo of grain from American ports to Piraeus, Greece. The charter party contained an aribtration clause. The cargo to be carried was a cargo of bulk grain sold by the United States to the Kingdom of Greece, under an agreement between the United States and Greece made pursuant to the Agricultural Trade Development and Assistance Act, 68 Stat. 454, 7 U.S.C. §§ 1691-1736, providing for the sale of surplus agricultural commodities.

The petition is brought pursuant to section 4 of the United States Arbitration Act, 9 U.S.C. § 4. It alleges that the "Atlantis" proceeded to a berth in Piraeus designated by respondent, but that the berth was not a safe one and, as a result, the vessel suffered damages of approximately $287,000. The petition also sets forth the arbitration clause, states that petitioner has designated its arbitrator and that respondent has failed to appoint its arbitrator, although due notice of aribtration and demand therefor has been served by petitioner. The petition was filed in this court in January 1963, and thereafter, in a memorandum by Judge Dawson, dated February 21, 1963, a motion for an order directing the Kingdom of Greece to proceed to arbitration was denied. The basis of denial

was that respondent asserted its sovereign immunity to suit. On appeal, the order was at first affirmed by a panel of the court of appeals. *Petrol Shipping Corp.* v. *Kingdom of Greece,* 326 F. 2d 117 (2d Cir. 1964). Thereafter, a rehearing en banc was granted, and in a per curiam decision dated May 25, 1964, after consideration of a brief filed by the United States as amicus curiae, the court of appeals vacated the judgment of the district court dismissing the petition and remanded the case "with instructions to take such evidence as is relevant to the contentions of the parties and to make a further determination in the light thereof and the arguments made thereon by the parties and, if the District Court deems desirable, by the United States." 332 F. 2d 370 (2d Cir. 1964). On August 12, 1964, following the death of Judge Dawson, the matter was ordered to be heard in this court on October 5, 1964.

On September 9, 1964, the court of appeals issued its opinion in *Victory Transport, Inc.* v. *Comisaria General,* 336 F. 2d 354 (2d Cir. 1964), *cert. denied,* 33 U.S.L. Week 3383 (U.S. June 1, 1965). In that case, which is remarkably similar on its facts to this case, the court affirmed an order compelling arbitration between the owner of a ship and a branch of the Spanish Ministry of Commerce. Petitioner there claimed hull damage in discharging cargo in an allegedly unsafe Spanish port, which had been designated as a safe port. The arbitration clause was identical to the arbitration clause involved in this case. In that case, the court held, among other things, that it would follow the distinction recognized by the State Department between a sovereign's private and public acts and that the chartering by respondent of a ship to transport a purchase of wheat partook "far more of the character of a private commercial act than a public or political act." 336 F. 2d at 360. Accordingly, the court denied the claim of sovereign immunity. The court also held that by agreeing to arbitrate in New York, respondent in that case consented

to the jurisdiction of the court that could compel the arbitration proceeding in New York.

In September 1964, respondent in this case sought an adjournment of the scheduled October hearing on remand to allow the Greek government to make a formal application to the United States Department of State presenting a claim of foreign sovereign immunity. The adjournment was granted and the application was made. The Secretary of State denied the plea for sovereign immunity. Thereafter, in lieu of a formal hearing before this court, the parties, on October 29, 1964, entered into a stipulation as to certain facts and exhibits, with the understanding that the court would then rule upon the renewed motion of petitioner for an order directing respondent to proceed to arbitration. Following the suggestion appearing in the circuit court opinion dated May 25, 1964, the court invited the United States to submit an amicus brief containing any suggestions or comments which the United States felt might be appropriate with respect to the record or the contentions of the parties. By letter dated November 18, 1964, from John W. Douglas, Assistant Attorney General, Civil Division, Department of Justice, the United States declined the invitation. In its letter, the government referred to the *Victory Transport* decision, *supra,* which it characterized as involving "circumstances that appear to be identical to those of the present case." In late November, final briefs were filed with this court by the parties. On January 7, 1965, a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit was filed in the *Victory Transport* case by the same law firm that represents the Greek government here. On June 1, 1965, the petition was denied. 33 U. S. L. WEEK 3383.

In its brief here, the Greek government agrees that the *Victory Transport* decision is similar to the instant case. Although it urges that the decision there was erroneous, it recognizes that this court is bound by the decision in that case and urges only two further points for consideration:

(1) The purported service of process on respondent was invalid and its invalidity cannot be cured; and (2) there has been no consent to the jurisdiction of the district court.

With regard to the service of process, the court of appeals in *Victory Transport* stated the following (336 F. 2d at 364):

> The appellant has also challenged the propriety of the extraterritorial service employed here. But since the appellant [h]as consented beforehand to the jurisdiction of the district court, the sole function of process in this case was, as Judge Murphy correctly noted below, to notify the appellant that proceedings had commenced. This function was certainly performed. Moreover, similar service of process on nongovernmental foreign corporations was held sufficient in the Farr and Orion cases, supra. No rule of international law requires special treatment for serving branches of foreign sovereigns. . . .

In this case, as in *Victory Transport,* respondent has consented beforehand to the jurisdiction of the district court, and the notice function of process has been performed.

On the issue of consent, respondent contends that under Greek law the representatives of the Purchase Directorate of the Ministry of Commerce who signed the charter party lacked authority to agree to arbitration. This point is raised for the first time in respondent's memorandum submitted after the parties had formally stipulated the facts and exhibits.[1] The Greek law relied upon is set out in the memorandum prepared by counsel presumably not expert in Greek law; appended to the memorandum are English and Greek versions of the assertedly relevant foreign legal materials. No other proof has been offered in the form of affidavits or otherwise, except an affidavit stating that the

[1] The memoranda were filed pursuant to instructions by the court. Transcript of conference on October 29, 1964, p. 6.

translation of the Greek Code into English is accurate. Indeed, it is respondent's position that "this Court may and should take judicial notice of the referenced provisions of Greek law. . . ."[2]

For purposes of this question, I will assume, without deciding, that the issue of authority to agree to arbitrate is for the court[3] on a motion to compel arbitration under 9 U.S.C. § 4.[4] Respondent cites Rule 4511(b) of the N. Y. CPLR as applicable under FED. R. CIV. P. 43(a).[5] This rule provides:

> Every court may take judicial notice without request of . . . the laws of foreign countries. . . . Judicial notice shall be taken . . . if a party requests it, furnishes the court sufficient information to enable it to comply with the request, and has given each adverse party notice of his intention to request it. Notice shall be given in the pleadings or prior to the presentation of any evidence at the trial, but the court may require or permit other notice.

Obviously, on the basis of the papers before me, this is not a case in which the court "shall" take judicial notice upon request. We are here concerned with the internal powers of a foreign government, and the applicable language and legal code is Greek (literally and figuratively). The paucity of proof supplied to the court has already been de-

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[2] Memorandum for the Kingdom of Greece, p. 9 n.1.

[3] See Moseley v. Electronic Missile Facilities, 374 U.S. 167 (1963); American Airlines, Inc. v. Louisville & Jefferson County Air Board, 269 F. 2d 811 (6th Cir. 1959); Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F. 2d 402 (2d Cir. 1959), *cert granted*, 362 U.S. 909, *cert. dismissed by stipulation*, 364 U.S. 801 (1960). I do not intend by this statement to preclude an arbitrator from considering this issue.

[4] The statute requires the court to order arbitration "upon being satisfied that the making of the agreement . . . is not an issue."

[5] That the Federal Rules of Civil Procedure apply to proceedings under Title 9, U. S. C., see FED. R. CIV. P. 81(a)(3).

scribed. Under these circumstances, it cannot be seriously contended that counsel has furnished "the court sufficient information to comply with the request."[6]

Neither do I choose to take judicial notice of the Greek law as a matter of discretion. The difficulties of language, the insubstantial assistance provided by respondent's counsel, and the court's unfamiliarity with the legal system involved alone persuade me not to exercise my discretion as respondent requests. Moreover, there are indications that under the circumstances an opposite choice would be error. *Walton* v. *Arabian-American Oil Co.*, 233 F. 2d 541, 544 (2d Cir.), *cert. denied*, 352 U.S. 872 (1956). *Cf. Wall Street Traders, Inc.* v. *Sociedad Espanola de Construction*, 236 F. Supp. 358 (S.D. N.Y. 1963); *Telesphore Couture* v. *Watkins*, 162 F. Supp. 727 (E.D. N.Y. 1958). Additionally, during the course of these protracted judicial and diplomatic proceedings, respondent had ample opportunity to present its foreign law contention and the evidence to back it up. It has chosen to hold back from the traditional route of proving the applicable Greek law as a matter of fact.[7] Failure to do so under these circumstances likewise militates against a discretionary exercise of judicial notice.

Since I will not take judicial notice of Greek law,[8] and there is no evidence in the record on which to base a find-

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[6] The question of notice to the other party of reliance on foreign law raised by Rule 4511(b) need not be decided.

[7] Although there is no motion before me to reopen the proceedings to take testimony on the issue of Greek law, I take this opportunity to indicate that I would not be disposed to granting such a request. Perhaps the arbitrator will consider this point.

[8] A further argument might be based on the recognition that the Arbitration Act is not an independent basis of jurisdiction. Another traditional basis of federal jurisdiction is needed—in this case, maritime. This raises the question whether, in an admiralty case, internal rules of foreign law can be judicially noticed. See Black Diamond S.S. Corp. v. Robert Stewart & Sons, Ltd., 336 U.S. 386, 396 (1949); Bournias v. Atlantic Maritime Co., 220 F. 2d 152, 157 (2d Cir. 1955).

ing of lack of authority, this contention fails. Accordingly, petitioner's motion is granted. So ordered.

Dated: New York, N. Y.
June 4, 1965

WILFRED FEINBERG
U.S.D.J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 119—September Term, 1963

(Argued October 30, 1963 Decided January 7, 1964.)

Rehearing In Banc Granted

(March 12, 1964—Decided May 25, 1964.)

[332 F. 2d 370]

PETITION OF PETROL SHIPPING CORPORATION,
Petitioner-Appellant,

v.

THE KINGDOM OF GREECE, MINISTRY OF COMMERCE, PURCHASE DIRECTORATE, *Appellee.*

Before LUMBARD, Chief Judge, and SWAN, WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN, HAYS and MARSHALL, Circuit Judges.

PER CURIAM.

Upon consideration of the brief filed by the United States as amicus curiae on the rehearing in banc at the request of the Court and the additional briefs of the parties, the Court considers further development of the facts to be desirable before disposition of the important issues

of law that have been raised. To that end, we alter the decision of the panel, 326 F. 2d 117 (2 Cir. 1964), vacate the judgment of the District Court dismissing the petition, and remand the case to the District Court with instructions to take such evidence as is relevant to the contentions of the parties and to make a further determination in the light thereof and the arguments made thereon by the parties and, if the District Court deems desirable, by the United States. The costs of this appeal will abide the ultimate determination.

SWAN, *Circuit Judge*, did not participate in this decision.

MARSHALL, Circuit Judge,

I dissent and would adhere to the decision of the panel.

Decision of the Panel

(January 7, 1964)

[326 F. 2d 117]

Before SWAN, CLARK and MARSHALL, Circuit Judges.

PER CURIAM:

Respondent chartered the petitioner's tanker *Atlantis* to carry grain from Texas to Greece.[1] At Piraeus, Greece, the Respondent designated a berth at which the *Atlantis* could not safely lie afloat and sustained damage for which the Respondent disclaimed responsibility. The charter party contained an arbitration clause. Petitioner appointed an arbitrator and, in reliance on § 4 of the Arbitration Act, 9 U.S.C.A., moved in the court below for an order directing

[1] The grain was purchased under an agreement between the United States and Greece made pursuant to the Agricultural Trade Development and Assistance Act, 7 U. S. C. A. § 1691 *et seq.*

Respondent to appoint one.[2] The Greek Ambassador to the United States, appearing specially, suggested want of jurisdiction to sue a sovereign state without its consent. Judge Dawson so held. The petitioner has appealed. It contends that the court erred in accepting the unsupported suggestion of the Greek Ambassador and should have required the Respondent to establish its right to immunity through channels of our State Department.

The narrow issue presented by the appeal is one which was settled for this court in *Puente* v. *Spanish National State,* 2 Cir., 116 F. 2d 43, cert. den. 314 U.S. 627. There the plaintiff sued for legal fees. No appearance was entered for defendant, but the Spanish Ambassador to the United States submitted to the Clerk of the District Court a letter which stated "that under prevailing principles of international law the Spanish Government as a Sovereign State is not subject to suit in your Court without its consent, which in this case it declines to accord." In a well-reasoned and lucid opinion (in which Judge L. Hand and Judge Chase concurred) Judge Clark stated that the question for decision is "how the conceded immunity of a friendly foreign state from suit without its consent is to be presented to a court." The Ambassador's letter was held sufficient. The opinion points out the distinction between cases where this is true and those where a foreign sovereign lays claim to a vessel over which the District Court has already acquired jurisdiction. In the latter type of case, of which *Ex parte Muir,* 254 U.S. 522 is an illustration, the foreign sovereign must establish through channels of our State Department its right to immunity. The Supreme Court has never, so far as we are advised, limited in any way the *Puente* decision.

The judgment is affirmed.

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[2] It should be noted that the arbitration clause provided that "for the purpose of enforcing any award, this agreement may be made a rule of the Court." Petitioner's suit sought an order directing appointment of an arbitrator, not an order *enforcing an award.*

CLARK, *Circuit Judge* (dissenting):

In *Puente* v. *Spanish Nat. States*, 2 Cir., 116 F. 2d 43, 45, cert. denied 314 U.S. 627, a case where, as we said, "there is no vestige of apparent jurisdiction," we stated this important limitation on the defense of sovereign immunity: "When a court appears to have all the elements of jurisdiction of an action, it is not improper to require of even a sovereign who would oust it of that jurisdiction that he furnish due proof to support his claim."[1] While our illustrative examples naturally concerned cases we had had, to wit, foreign vessels within the district court's jurisdiction, we expressly declined to limit the rule to particular instances, and indeed in contemporary cases we recognized the controlling importance of State Department pronouncements as to immunity claims. See, e.g., *Sullivan* v. *State of Sao Paulo*, 2 Cir., 122 F. 2d 355; *United States ex rel. D'Esquiva* v. *Uhl*, 2 Cir., 137 F. 2d 903, 906-907; see also *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 38: "We can only conclude that it is the national policy not to extend the immunity in the manner now suggested, and that it is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the government, although often asked has not seen fit to recognize."

But it is most important to note that in later authorities not mentioned below or here, the law to which these cases pointed has been explicitly stated and the defense of sovereign immunity definitely restriced in cases involving the commercial activities of a foreign state.[2] In the now well

[1] The *Puente* case—unlike the *Sullivan* case—has never been cited in the Supreme Court and very rarely (almost never in recent years) in lower federal courts, undoubtedly because the later events recounted in the text showed it a less extensive precedent than as here cited.

[2] For discussion of this trend see, e.g., Timberg, *Expropriation Measures and State Trading*, 1961 Proc. Am. Soc. Int. L. 113, 118.

known and important "Tate letter" of May 19, 1952, on behalf of the Secretary of State to the Attorney General, by Professor Jack B. Tate, then Acting Legal Adciser to the Secretary, the Department expressly clarified its position and in a reasoned exposition citing precedents set forth its future policy "to follow the restrictive theory of sovereign immunity"—applicable to a sovereign engaged "in comercial activities"— and to limit the claim of immunity accordingly. 26 Dept. State Bull. 984 (1952). This was followed in *National City Bank of New York* v. *Republic of China*, 348 U.S. 356, 361, in saying that "[r]ecently the State Department has pronounced broadly against recognizing sovereign immunity for the commercial operations of a foreign government," with citation to the Tate letter. And since that time (1952) it appears to have been common practice to seek or await State Department advice before a grant of this and other forms of immunity is made. Among illustrative cases we may cite *Bernstein* v. *N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 2 Cir., 210 F. 2d 375, where we reversed a previous ruling when informed of a State Department release to the contrary; and *Banco Nacional de Cuba* v. *Sabbatino*, 2 Cir., 307 F. 2d 845, 855-858, cert. granted 372 U.S. 905, containing a full discusison, with extensive citations, of the role of the State Department in civil litigation in the federal courts. See also *Rich* v. *Naviera Vacuba, S. A.*, 4 Cir., 295 F. 2d 24.

Here the district court, in granting immunity, without any advice whatever from the State Department, in a case involving a grain sale to, and an agreement to arbitrate by, the Kingdom of Greece, thus accorded that Kingdom a special privilege, contrary to the principles stated above. Before taking such a course the district judge should have asked the respondent to advise him as to the State Department's position with reference to its claim of immunity or should himself have directed an inquiry to the Secretary of State. There was particular reason to do so here, as this concerned not the enforcement of a final decree, but merely

the preliminary step of requiring the respondent to appoint an arbitrator, as it had agreed in its contract to do. See for such an order against a foreign corporation under similar circumstances, *Farr & Co.* v. *Cia. Intercontinental De Navegacion De Cuba, S. A.*, 2 Cir., 243 F. 2d 342. The circumstances of consent to the arbitration of what appears clearly to be a commercial transaction suggest a good possibility that the Department which has the responsibility (as we do not) for control of our foreign relations will not support the defense of immunity here. As it stands, the district court has assumed to interfere most discriminatorily in delicate foreign relations not entrusted to its responsibility, and a majority of the court now supports the interference: Had this ever been the law and common practice, it is surely not so now. I would reverse and remand for ascertainment of the State Department's position as to this immunity claim.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Memorandum Decision and Order of the Honorable Archie O. Dawson

MATTER OF THE PETITION OF PETROL SHIPPING CORPORATION

63 Civ. 142

This is a petition by Petrol Shipping Corporation, owner of the Tanker *Atlantis*, for an order directing the Kingdom of Greece to proceed to arbitration. Petrol Shipping Corporation and the Kingdom of Greece were parties to a contract by which the Tanker *Atlantis* was chartered for the carriage of a cargo of grain from Houston, Texas to Greece. The charter party contained an arbitration clause. The cargo to be carried was apparently a cargo of bulk grain which was sold by the United States to the Kingdom

of Greece under Title I of Public Law 480 providing for the sale of surplus agricultural commodities.

The Greek Ambassador to the United States has filed on this motion a suggestion of lack of jurisdiction by reason of sovereign immunity asserting that the Kingdom of Greece asserts its sovereign immunity to suit in this action.

That Greece is a sovereignty and a nation friendly to the United States is a matter of which this Court may take judicial notice. No dispute has been raised as to the authority of the Greek Ambassador to file this suggestion of sovereign immunity.

Since the motion seeks to compel on order directing a sovereign state to take certain action, and since the recognized Ambassador of that state has raised the question of sovereign immunity, this Court must *ab initio* consider whether it has any authority to take the action sought. The law is clear that a foreign sovereign is immune from suit in courts of the United States unless it gives its consent to such suit. *Guarantee Trust Co. of N. Y.* v. *United States,* 304 U.S. 129, at p. 134; *Principality of Monaco* v. *Mississippi,* 292 U.S. 313 (1934). An order of this court, directing the Kingdom of Greece to proceed to arbitration, cannot be entered against such sovereign state unless it waives its immunity to the action.

There is an indication in the memorandum submitted in support of the motion that the Government of Greece, by a letter dated January 3, 1962, had authorized their Foreign Trade Administrator in Washington, D. C. to nominate an arbitrator for this arbitration. If this is so, it is the voluntary act of the Kingdom of Greece and it is to be hoped that arbitration may proceed in this voluntary manner. If the Government of Greece is ready to proceed with the arbitration there is no occasion for this Court to direct them to arbitrate. If it is not ready to proceed to arbitration, but

prefers to rely on its sovereign immunity, there is no jurisdiction in this Court to compel it to act.

The motion is denied.

So ordered.

ARCHIE O. DAWSON,
U. S. D. J.

Dated: New York, N. Y.
February 21, 1963.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 489

KINGDOM OF GREECE, MINISTRY OF COMMERCE, PURCHASE DIRECTORATE,

Petitioner

v.

PETROL SHIPPING CORPORATION,

Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

ELI ELLIS,
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Counsel for Respondent

Of Counsel:
ROBERT W. MULLEN

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IN THE

Supreme Court of the United States

October Term, 1966

No.

KINGDOM OF GREECE, MINISTRY OF COMMERCE, PURCHASE DIRECTORATE,

Petitioner

v.

PETROL SHIPPING CORPORATION,

Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement

The petitioner, the Ministry of Commerce, Purchase Directorate of the Kingdom of Greece (hereinafter denominated Charterer) and the respondent, Petrol Shipping Corporation, a New York corporation (hereinafter denominated Shipowner) entered into a written voyage-charter in the City of New York for the carriage of a cargo of grain by the U. S. Flag Tanker ATLANTIS from Houston, Texas and/or Baton Rouge, Louisiana, to Piraeus, Greece. The grain to be carried by the vessel was purchased by the Charterer from the United States under the credit provisions of Public Law 480 and so was required to be carried in a United States Flag vessel.

The charter party, which Charterer admits is subject to the Rules and Regulations of the United States Department of Agriculture, contained the following standard arbitra-

tion clause (Petitioner's Appendix hereinafter cited as "Pet.", Respondent's Appendix hereinafter cited as "Resp."):

> "Should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men". (Pet. 2a).

In the performance of the charter the *Atlantis* suffered substantial damage at the discharge berth in Piraeus for which the Shipowner made claim against the Charterer on the ground that the discharging berth was an unsafe berth. Upon disclaimer by the Charterer, the Shipowner notified the Charterer by letter dated September 29, 1961 of its appointment of its arbitrator, under the above clause, and demanded that the Charterer appoint its arbitrator so that the dispute between the parties concerning responsibility for the ship's damage could be determined by arbitration, in accordance with the agreement (Resp. 4a).

The Shipowner, upon Charterer's failure to comply with the foregoing demand made a further demand by letter dated December 15, 1961 (Resp. 5a). The Charterer then advised that it had authorized the Greek Government Foreign Trade Administration in Washington to proceed forthwith (Resp. 14a).

The Charterer in spite of its notices that it would proceed forthwith, neglected to name its arbitrator. Whereupon the Shipowner, by motion returnable January 29, 1963, petitioned the United States District Court for the Southern District of New York for an order directing the Charterer to proceed with the arbitration (Resp. 3a-5a).

At the request of the Charterer's attorney, the parties stipulated the adjournment of the argument of the motion

to February 19, 1963. The stipulation was signed by the attorney for the Charterer and contained no reservations with respect to his authority (Resp. 34a).

The Charterer opposed the motion, submitting in opposition a brief affidavit entitled "Suggestion of Greek Ambassador", merely stating that the Kingdom of Greece is a friendly sovereign power which is not subject to suit without its consent, which the Ambassador stated it declined to accord, and further asserting its sovereign immunity (Resp. 10a, 11a). No assertion or claim was made respecting service of the motion papers.

The Charterer also submitted in opposition the affidavit of the Director of the Office of Foregn Trade Administration, Ministry of Commerce, Kingdom of Greece, which amounted to no more than a concession that the aforesaid charter party had been entered into and that the cargo was purchased by the Greek Government from the U. S. Department of Agriculture under Public Law 480, which required 50% of such cargoes to be carried in United States Flag ships (Resp. 12a, 13a).

As hereinbefore stated the Charterer refused to nominate its arbitrator and claimed sovereign immunity, although it had notified the Shipowner on January 3, 1962, after the Shipowner demanded arbitration, that it had authorized the Greek Government Foreign Trade Administration in Washington, D. C., to nominate its arbitrator (Resp. 14a). Movant Shipowner urged that this circumstance clearly demonstrated that the Charterer's claim for sovereign immunity was unfounded.

On February 21, 1963, District Judge Dawson dismissed the Shipowner's petition, stating:

> "If [the Kingdom of Greece] is not ready to proceed to arbitration, but prefers to rely on its sovereign immunity, there is no jurisdiction in this Court to compel it to act. The motion is denied" Pet. 26a, 27a).

The Shipowner appealed the denial of its petition to a panel of the 2nd Circuit Court of Appeals consisting of

Judges Swan, Clark and Marshall. On January 7, 1964 the district court was affirmed (326 F. 2d 117) on the authority of *Puente* v. *Spanish National State,* 116 F. 2d 43 (2nd Cir. 1940) *cert. denied,* 314 U.S. 627. The panel was not unanimous and it was Judge Clark, the writer of the *Puente* decision, 24 years before, who dissented. Judge Clark urged at page 118 that the case be reversed and remanded for ascertainment of the State Department's position as to the claim of sovereign immunity.

The Shipowner's application for rehearing *en banc* by the Circuit Court was granted. That Court upon reconsideration remanded the case for the further development of facts, particularly with regard to the position of the United States Government (Pet. 21a).

Upon remand the Charterer finally and for the first time in this proceeding made a formal request of the State Department that sovereign immunity be granted to it. This plea was made though the transaction involved was of a manifestly commercial nature. In presenting its request the Charterer stated in part to the State Department as follows:

> "The assertion of personal jurisdiction by the United States courts over the Kingdom of Greece is contrary to established principles of international law governing the comity of nations" (Resp. 18a).

The request for recognition of the Charterer's assertion of sovereign immunity, considered with care and prudence in the national interest, was absolutely refused. The refusal by the State Department was terse but contained the rationale of its necessity:

> "As the Embassy is probably aware, it is the practice of the Department of State when considering requests for recognition of sovereign immunity from suit by foreign governments to follow the policy set forth in its letter of May 19, 1952, to the Acting Attorney General, the so-called Tate letter, a copy of which is enclosed. Applying that policy to the facts

in the case under consideration, the Department sees no basis for any conclusion other than that the acts on which the suit is based are private acts (*jure gestionis*). In these circumstances, the Department regrets that it is unable to comply with the request of the Ambassador of the Kingdom of Greece for recognition of sovereign immunity from suit in the instant case.

"It follows that the other questions raised by the Memorandum attached to the Ambassador's note are matters for the Court" (Resp. 21a, 22a).

Considering this action of the United States, through the State Department, as well as the documentation and stipulations of counsel in the framework of authority supplied by *Victory Transport, Inc.* v. *Comisaria General,* 232 F. Supp. 294, aff'd., 336 F. 2d 354 (2d Cir. 1964), *cert. denied,* 381 U. S. 934, which involved the Spanish government, District Judge Feinberg granted the Shipowner's motion to compel arbitration. The U. S. Court of Appeals for the Second Circuit affirmed by opinion which searchingly examined Charterer's contentions with respect to jurisdiction and sovereign immunity.

Argument

The petition for a writ of certiorari should be denied for the following reasons:

1. This Court has already denied certiorari relief in *Victory Transport, Inc.* v. *Comisaria General, supra,* a case on all fours with the case at bar and with facts so similar as to nearly attain a geometrical congruity.

2. The Charterer has been able to point to no substantive conflict between Circuit Court decisions on the subject matter in this suit, nor is there any conflict between the decision of the Circuit Court herein and the decisions of the United States Su-

preme Court. The Charterer is really petitioning for a further hearing. It has had 5 hearings already.

3. In view of the arbitration agreement upon which the suit turns, there is no question of general law herein of importance which is in the public interest to have decided by this court of last resort.

4. The argument of petitioner that Certiorari should be granted is academic. Were this court to grant the petition and reverse, the only result would be that notice of arbitration would have to be redelivered by a method approved by petitioner's cases. The accomplishment of an academic result has not been the traditional role of this court.

POINT I

The Charterer has no cognizable sovereign immunity with respect to the within commercial transaction.

Fantastic, incredible it is that the Charterer should approach this high court in the guise of a citizen wishing to avoid a court decision which would "complicate or embarass the conduct of *our* foreign relationships or invite retaliation from foreign courts with respect to agencies of the United States operating abroad"? This artificial addiction of the Charterer to the well being of our foreign policy merely emphasizes its chameleon-like posturing.

The Charterer has changed its position many times since it was first encountered by the Shipowner upon the field of Commerce. In the first instance, at the time of the signing of the charter party, it was a purchase directorate astutely doing business in the world commodity market. Later, after some malfeasance on its own part, it became the Kingdom of Greece, a sovereign entitled to immunity first developed in ancient times, when trade and commerce were beneath the dignity of Kings. Now before this Court it appears in the first person language of a U. S. citizen consecrated to the purification of the Federal Rules of Civil Procedure and to the solemn instruction of the State Department. The Charterer poses as the protector of the foreign rela-

tions of the United States even though in the District Court the Department of State refused to advise the District Court that the Charterer was entitled to a sovereign immunity defense.

District Judge Feinberg in compliance with the suggestion of this Court afforded the United States an opportunity to present its arguments. The United States through the Department of Justice by letter from John W. Douglas, Assistant Attorney General, declined the invitation, stating:

> "The Department has carefully considered your invitation to submit an *amicus curiae* brief in this litigation. As you know, we filed such a brief in this case before the Court of Appeals, at the request of that court. Following the remand of this case by the Court of Appeals, that court rendered its decision in *Victory Transport, Inc.* v. *Comisaria General* (No. 28636, September 9,. 1964), which involves circumstances that appear to be identical to those of the present case. Accordingly, the discussion in that case concerning sovereign immunity would seem to be applicable here and to govern this case.
>
> "The Department having expressed its views in the Court of Appeals brief and that court having authoritatively spoken on the subject of sovereign immunity in the *Victory Transport* case, I am of the opinion that this Department could add nothing that would be of constructive assistance to this Court" (Resp. 31a).

The case at bar and the *Victory Transport* decision manifests not only the long continuity of legal precedent but also the evolutionary nature of a proper administration of justice. The decision represents an ever increasing restriction on the comity of sovereign immunity in nearly perfect equipoise with the expanding commercial activities of foreign governments.

Regardless of the broad and feckless argument of the Charterer, the only imaginable distinction between this case and the *Victory Transport* case is the manner of notice by mail, i.e., regular mail as against registered mail.

POINT II

The Court below properly found jurisdiction was created by the agreement to arbitrate and it did not depend upon service. Service as such was required merely for the purpose of notice and that function was performed.

Charterer would use the failure of Rule Four of the Federal Rules of Civil Procedure to provide for service on a commercial office of a foreign state to be a technical anomaly preventing the effectuation of the State Department's refusal to grant sovereign immunity in this case.

The prolonged and sophistic argument of the Charterer creates an unwarranted confusion when considered against the opinion of the Second Circuit Court of Appeals below. That Court properly divided the elements of process into its duplex purposes, i. e., subjection to jurisdiction and notice. The Court in brief held that the jurisdiction requirement of process had been met by the Charterer's agreeing to arbitrate in New York and that by so doing he "makes himself as amenable to suit as if he were physically present in New York." With respect to the notice aspect of service and the *casus omissus* in the F.R.C.P. the Court below correctly stated:

> "And when there is no Federal Rule, and no local rule, the court may fashion one not inconsistent with the Federal Rules" (Pet. 8a).

Charterer, though feigning concern for the Federal Court system, in reality bemoans the Second Circuit's ability to accomplish substantial justice in spite of Charterer's technical ploy with respect to the method of notice. To those brought up to believe that for every right, a remedy, the opinion of the Second Circuit is the *Beau Ideal.* Judge Murphy in the companion case, *Victory Transport, Inc.* v. *Comisaria General Etc.,* 232 F. Supp. 294, also put his finger on the thrust of "process" when he stated at page 295:

> "By entering into an agreement for arbitration in New York, the parties consented to New York's jurisdiction. Thus service of process became significant only to the extent that it was required so as to avoid a violation of due process."

It is respectfully submitted that the stipulation of counsel as well as the affidavits of mailing of the motion papers, the receipt of which is stipulated to, represent a more than adequate compliance with the notice requirements of due process. In the instant case, the service of process was not necessary in a technical jurisdictional sense since the Charterer by the arbitration contract agreed to the jurisdiction of the court.

As was held in the case below and in *Victory Transport,* what remained to be done and what was done by the Shipowner was the giving of fair notice. This the Charterer cannot deny, for it has never been heard to deny the receipt of the various notices both directly and through its counsel.

POINT III

Even if the rationale of the Court below were otherwise, objections to process have been long since waived.

The Charterer has admitted receipt of the petition and notice of motion. These were sent by mail to (1) Ministry of Commerce, State Purchase Directorate, c/o Greek Government Foreign Trade Administration; (2) Messrs. Becker & Greenwald, proctors for the Kingdom of Greece, Ministry of Commerce, Purchase Directorate, Washington, D. C.; and (3) Kingdom of Greece, Ministry of Commerce, Purchase Directorate, New York, New York (Resp. 7a, 8a, 9a).

The Courts below, properly reviewing the stipulations of counsel and recognizing the principles of process as enunciated in *Victory Transport,* i.e., the duplex purpose of jurisdiction and notice, decided as a fact that Charterer

consented beforehand to the jurisdiction of the District Court (Pet. 5a, 17a). Apparently, further relying on the stipulation of counsel, the District Court found that the notice function had also been performed.

That Court in so ruling held:

> "In this case, as in *Victory Transport,* respondent has consented beforehand to the jurisdiction of the district court, and the notice function of process has been performed." (Pet. 17a).

The United States through the Department of Justice obviously supported the view of District Judge Feinberg, since at the time the arguments of the United States were solicited by Judge Feinberg, the claim of Charterer that the service was invalid had already been raised. The United States referred to the *Victory Transport* case in which the court said (336 F. 2d at 364):

> "The appellant has also challenged the propriety of the extraterritorial service employed here. But since the appellant [h]as consented beforehand to the jurisdiction of the district court, the sole function of process in this case was, as Judge Murphy correctly noted below, to notify the appellant that proceedings had commenced. This function was certainly performed. Moreover, similar service of process on nongovernmental foreign corporations was held sufficient in the Farr and Orion cases, supra. No rule of international law requires special treatment for serving branches of foreign sovereigns. . . ."

The findings of Judge Feinberg are a correct basis for factually deciding there to be sufficiency of process. However, in further support of the correctness of the ruling, the Shipowner points to the Federal Rules of Civil Procedure, particularly Rule 12(b) which covers insufficiency of service of process. F.R.C.P. 12(h) read with F.R.C.P. 12(b)

above certainly disposes of the Charterer's tardily raised contention. Rule 12(h) reads:

> "A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply . . .".

The word "tardily" is used advisedly with respect to the untimeliness of Charterer's objection to the service of process. The original motion herein was returnable on January 29, 1963 but was adjourned twice by stipulation of counsel. First on January 28, 1963, and later on February 4, 1963, it was adjourned to February 19, 1963, the date when it was finally argued before Judge Dawson. No contention of insufficiency of service of process was raised on the initial motion or at any time between the original notice of motion through the reargument in the Second Circuit Court of Appeals in February, 1964. Throughout the period stated above, the sole argument of the Shipowner with respect to jurisdiction was that which depended on sovereign immunity. The fact that sufficiency of process was not raised by the Charterer is conceded in Charterer's letter of May 4, 1964:

> "We had not previously urged that this case should be dismissed because of improper service, although the point of the propriety of service was raised by [Shipowner] in its reply brief . . ." (Resp. 33a).

The waiver resulting from such a course of action was treated with by the late District Judge Edward Conger of the United States District Court for the Southern District of New York in *P. Beiersdorf & Co., Inc.* v. *Duke Laboratories, Inc.*, 10 F.R.D. 282 (1950), when he found that the objection to service of process had been waived:

> "I am of the opinion, however, that the defendant has waived such defect. Rule 12(h) of the Federal

> Rules provides for waiver of all defenses and objections which are not presented by motion nor in the answer or reply, with certain exceptions. 'If a party makes a motion under Rule 12 and omits therefrom some defense or objection which could have been included, he may not thereafter make a motion based on such defense or objection * * * nor, under subdivision (h), may he raise the defense in his answer, unless it comes within one of the exceptions in (h).' Moore's Federal Practice, 2d Ed., p. 2327.
>
> "After the summons and complaint had been served in the defective method mentioned, the defendant notices the instant motion without any objection to the service of process, although the facts with respect thereto were alluded to in an affidavit accompanying the motion papers. At the time of the argument he raised the point. But this was long after the time for which the motion was originally noticed and after the plaintiff had served an amended complaint purporting to correct the defects suggested by the defendant's motion with respect to the original complaint."

The first above-mentioned stipulation adjourning the motion was signed by the attorneys for the Kingdom of Greece without reservation or allusion to lack of authority to act for their client. The legend on the stipulation reads as follows:

> "Becker and Greenwald, Proctors for the Kingdom of Greece, Ministry of Commerce, Purchase Directorate" (Resp. 34a).

Only in the second stipulation did the attorneys, who now complain of insufficiency of process, begin dominating themselves as "appearing specially".

While the effect of Rule 12 is to make unnecessary the age-old technical distinction between a general and a special appearance, the reason for the former distinction remains.

In up-dating the Federal practice, the rule makers recognized the evil sought to be prevented by the old special appearance distinction and skillfully thwarted the confusing effect of tardily raised objections to service of process. Rule 12(h) of the Federal Rules of Civil Procedure denominates as waiver the failure by a party to timely present its defenses or objections.

In this connection Judge Bailey Aldrich stated in *Emerson* v. *National Cylinder Gas Co.*, 131 F. Supp. 299 (D. C. Mass. 1955), that while with a general appearance a defendant can still contest jurisdiction over the person, that contest must be timely raised.

Charterer, in the Court below sought to circumvent its waiver by showing it had raised service of process questions on remand, but its objection on remand cannot revive a waiver. The very first appeal herein, when taken, deprived the Trial Court of the power of amendments of pleadings. *Braiser* v. *United States*, 229 F. 2d 176 10th Cir. (1956) *cert. denied* 351 U.S. 925.

On remand of the case at bar the instructions were not for the District Court to accept new pleadings or motions with respect thereto, but were simply "to take such evidence as is relevant to the contentions of the parties and to make a further determination in the light thereof . . . ".

It is respectfully submitted that objections to service of process by the Charterer not made in the first instance in the District Court, could not properly be raised on the first appeal and were not authorized by the mandate. The Charterer argued in the Court below that because in the second hearings on mandate it raised the question of service of process, those questions are a proper subject for appeal because the Shipowner, by permitting this technical objection to be raised at the second hearing without contest, had waived its objection to that question being raised on the second appeal.

It is respectfully submitted that such an argument if accepted would constitute a new legal theory — "waiver of waiver". In fact, the Charterer waived its objection to the

service of process at the first hearing and forever after must be deemed bound by that waiver, for jurisdiction, if it were lacking, attached at once and could not be detached a year later on the remand.

CONCLUSION

In this case no questions of subject matter jurisdiction or of venue are presented. The jurisdiction depended on the agreement of the Charterer and the Shipowner. In the case *National Rental* v. *Szukhent,* 375 U.S. 311 (1964) this court held at pages 315, 316:

> "And it is settled, as the courts below recognized, that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether. (Citing cases)."

In view of the foregoing, it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ELI ELLIS,
Counsel for Respondent
No. 26 Broadway
New York, N. Y. 10004

ROBERT W. MULLEN,
Of Counsel.

Notice of Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

63 Civ. 142

In the Matter

of the

Petition of Petrol Shipping Corporation, as Owner of the tanker ATLANTIS, for an order directing the Kingdom of Greece, Ministry of Commerce, Purchase Directorate, charterer of said vessel, to proceed to arbitrate in accordance with the terms of its written agreement.

Sirs:

PLEASE TAKE NOTICE that upon the annexed petition, the undersigned will move this Court pursuant to Section 4 of the Arbitration Act (9 U. S. C. A. 4), at a stated term for the hearing of motions in the United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 29th day of January, 1963 at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order directing the Kingdom of Greece, Ministry of Commerce, Purchase Directorate, to proceed to arbitration in accordance with the terms of its agreement, and for such other and further relief as to the Court may seem just and proper in the premises.

Dated: New York, N. Y.
January 10, 1963.

Yours, etc.,

HILL, BETTS, YAMAOKA, FREEHILL & LONGCOPE,
Proctors for Vessel Owner-Petitioner,
26 Broadway,
New York 4, N. Y.

Notice of Motion

To:

BECKER & GREENWALD,
Proctors for the
KINGDOM OF GREECE,
MINISTRY OF COMMERCE,
PURCHASE DIRECTORATE,
839—17th Street, N. W.,
Washington 6, D. C.

To:

KINGDOM OF GREECE,
MINISTRY OF COMMERCE,
PURCHASE DIRECTORATE,
30 Rockefeller Plaza,
New York 20, N. Y.

To:

MINISTRY OF COMMERCE,
STATE PURCHASE DIRECTORATE,
c/o GREEK GOVERNMENT,
FOREIGN TRADE ADMINISTRATION,
2211 Massachusetts Avenue, N. W.,
Washington, D. C.

Petition to Compel Arbitration

[SAME TITLE]

TO THE HONORABLE THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

The petition of Petrol Shipping Corporation as Owner of the Tanker *Atlantis,* for an order directing the Kingdom of Greece, Ministry of Commerce, Purchase Directorate, as Charterer of said vessel, to proceed to arbitration in accordance with the terms of its written agreement, respectfully shows to this Court, and alleges upon information and belief:

1. At all material times petitioner was and now is a corporation organized and existing under and by virtue of the laws of the State of Delaware and the owner of the Tanker *Atlantis,* and at the time of the agreement referred to herein was doing business within this District.

2. At all material times, respondent, Kingdom of Greece, Ministry of Commerce, Purchase Directorate, was engaged in business in the State of New York and has an office and place of business at 30 Rockefeller Plaza, New York, N. Y.

3. On or about February 12, 1960, in the City of New York, petitioner and respondent entered into a written charter party agreement which provided for the Tanker *Atlantis* to be chartered for a voyage from Houston, Texas and Baton Rouge, Louisiana to Piraeus, Greece, carrying a cargo of grain. The vessel pursuant to said charter proceeded to the port of Piraeus and at said port to a berth designated by the respondent. The said berth designated

by the respondent was not one at which the vessel could properly and safely lie afloat and as a result thereof the vessel suffered severe and serious damage.

4. The libellant as a result of the unsafe berth furnished by the respondent suffered damages of approximately $287,000, as best as can presently be ascertained, no part of which has been paid although duly demanded.

5. The aforesaid charter party contains the following clause:

> "ARBITRATION CLAUSE NEW YORK: Should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men."

Pursuant to the aforesaid provision, petitioner has designated Mr. R. V. Everett as its arbitrator, and hereby demands that respondent name an arbitrator in accordance with the terms of its written agreement.

6. Section 4 of the Arbitration Act (9 U. S. C. A. 4) provides that in case of failure or refusal of another party to arbitrate under a written agreement to do so, the aggrieved party may petition the District Court for an order directing that such arbitration proceed in the manner provided for in such agreement.

7. Petitioner, under date of September 29, 1961, served upon the respondent a notice calling for arbitration in accordance with the provisions of the charter as set forth above and in such notice set forth the damages claimed

and the arbitrator designated by the petitioner. Respondent having failed to reply to the aforementioned demand under date of December 15, 1961, petitioner made a further demand for the respondent to appoint its arbitrator. The respondent has failed to comply with petitioner's demands, all in violation of the charter provisions quoted above.

8. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

WHEREFORE, petitioner prays for an order directing respondent to proceed to arbitration in accordance with the terms of its written agreement, and for such other and further relief as to the Court may seem just and proper in the premises.

HILL, BETTS, YAMAOKA, FREEHILL & LONGCOPE,
Proctors for Vessel Owner-Petitioner.

Verification

SAME TITLE

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

E. C. STAMATIOU, being duly sworn, deposes and says:

That he is an officer, to wit: the Vice President of PETROL SHIPPING CORPORATION, that he has read the foregoing petition to compel arbitration and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; the reason this verification is made by deponent and not by petitioner is because petitioner is a corporation.

PETROL SHIPPING CORPORATION

By /s/ E. C. STAMATIOU

Sworn to before me this 10th day of December, 1962.

SIGMUND FAUST
Notary Public, State of New York
No. 31-1173750
Qualified in New York County
Commission Expires March 30, 1963

Affidavit of Service by Mail

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LILLIAN F. CLARK, being duly sworn deposes and says: That on the 10th day of January, 1963, she served the attached Notice of Motion upon Ministry of Commerce, State Purchase Directorate, c/o Greek Government Foreign Trade Administration, named therein, at 2211 Massachusetts Avenue, N. W., Washington, D. C., by depositing a true copy thereof securely enclosed in a post-paid wrapper in a Post Office box regularly maintained by the United States Government at No. 26 Broadway, New York 4, N. Y., directed to them at the last business address designated by them for that purpose upon the preceding papers in this action. Deponent is over the age of eighteen years.

LILLIAN F. CLARK

Sworn to before me this 10th day of January, 1963.

SIGMUND FAUST
Notary Public, State of New York
No. 31-1173750
Qualified in New York County
Commission Expires March 30, 1963

Affidavit of Service by Mail

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LILLIAN F. CLARK, being duly sworn deposes and says: That on the 10th day of January, 1963, she served the attached Notice of Motion upon Messrs. Becker & Greenwald, the proctors for the Kingdom of Greece, Ministry of Commerce, Purchase Directorate, named therein, at 839—17th Street, N. W., Washington 6, D. C., by depositing a true copy thereof securely enclosed in a post-paid wrapper in a Post Office box regularly maintained by the United States Government at No. 26 Broadway, New York 4, N. Y., directed to said attorneys at the last business address designated by said attorneys for that purpose upon the preceding papers in this action. Deponent is over the age of eighteen years.

LILLIAN F. CLARK.

Sworn to before me this 10th day of January, 1963.

SIGMUND FAUST
Notary Public, State of New York
No. 31-1173750
Qualified in New York County
Commission Expires March 30, 1963

Affidavit of Service by Mail

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LILLIAN F. CLARK, being duly sworn deposes and says: That on the 10th day of January, 1963, she served the attached Notice of Motion upon Kingdom of Greece, Ministry of Commerce, Purchase Directorate, named therein, at 30 Rockefeller Plaza, New York 20, New York, by depositing a true copy thereof securely enclosed in a post-paid wrapper in a Post Office box regularly maintained by the United States Government at No. 26 Broadway, New York 4, N. Y., directed to them at the last business address within the State designated by them for that purpose upon the preceding papers in this action. Deponent is over the age of eighteen years.

LILLIAN F. CLARK.

Sworn to before me this 10th day of January, 1963.

SIGMUND FAUST
Notary Public, State of New York
No. 31-1173750
Qualified in New York County
Commission Expires March 30, 1963

Suggestion of Greek Ambassador of Lack of Jurisdiction by Reason of Sovereign Immunity

SAME TITLE

ALEXANDER A. MATSAS informs and suggests to this Honorable Court that:

1. He is the duly accredited Ambassador Extraordinary and Plenipotentiary of the Kingdom of Greece to the United States of America.

2. The Kingdom of Greece is a friendly foreign sovereign which is recognized by the United States of America.

3. The Kingdom of Greece is a sovereign not subject to suit in this Honorable Court without its consent, which, in this case it declines to accord.

4. The Kingdom of Greece hereby asserts its sovereign immunity to suit in this action.

Wherefore the undersigned, appearing specially for the Kingdom of Greece and without submitting its rights to the jurisdiction of this Honorable Court, respectfully suggests that this Honorable Court lacks jurisdiction over the subject matter of this action and over the Kingdom of

Suggestion of Greek Ambassador of Lack of Jurisdiction by Reason of Sovereign Immunity

Greece or its property, and respectfully prays for an order dismissing this action for lack of jurisdiction.

/s/ A. MATSAS,
Ambassador Extraordinary and Plenipotentiary of the Kingdom of Greece to the United States of America.

Dated: January 29th, 1963.

ARTHUR M. BECKER,
Counsel for the
Kingdom of Greece,
appearing specially
only for the purpose
of presenting the
foregoing suggestion.

Office and P. O. Address:

80 Broad Street,
New York, N. Y.

[SEAL]

Affidavit of A. D. Sismanidis in Opposition to Motion

DISTRICT OF COLUMBIA) ss.

A. D. SISMANIDIS, being duly sworn, deposes and says:

1. I am the Director, Office of Foreign Trade Administration, Ministry of Commerce, Kingdom of Greece.

2. The Kingdom of Greece is a party to an Agreement with the United States of America providing for the sale of surplus agricultural commodities to the Kingdom of Greece, under the authority of Title I of Public Law 480 (Act of July 10, 1954, 68 Stat. 455, 7 U. S. C. A. § 1701, *et seq.*). Pursuant to this Agreement, the United States Department of Agriculture issues procurement authorizations to the Greek Government authorizing grain purchases by the Greek Government.

3. In connection with the transportation of a cargo of grain purchased by the Greek Government in accordance with such a procurement authorization of the United States Department of Agriculture, the Greek Government Ministry of Commerce, on January 9, 1960, issued a Call for Ocean Transportation Bids to carry a Public Law 480, Title I bulk grain cargo from the United States to Greece. This Call for Ocean Transportation Bids requested that bids be filed with the Ministry of Commerce, State Purchase Directorate, Caningos Square, Athens, Greece; and incorporated terms and conditions of a Call for Ocean Transportation Bids, dated December 20, 1957, which provided that:

> "The respective contract of affreightment to be signed by the contracting parties shall be subject to the rules and regulations of the United States Department of Agriculture (U. S. D. A.) governing shipments under Title I of Public Law 480. Consequently, [sic.] the 50% at least, of the cargo shall be moved on U. S. Flag vessels."

Affidavit of A. D. Sismanidis in Opposition to Motion

4. Petrol Shipping Corporation, owner of the American Flag Tanker *Atlantis,* responded to the Greek Government's Call for Ocean Transportation Bids and a charter agreement was entered into between Petrol Shipping Corporation and the Ministry of Commerce, State Purchase Directorate of Athens, Greece, dated February 12, 1960, providing for the transportation on the Tanker *Atlantis* of the Greek Government's Public Law 480, Title I bulk grain cargo from Houston, Texas, and Baton Rouge, Louisiana, to Piraeus, Greece.

/s/ A. D. SISMANIDIS

DISTRICT OF COLUMBIA) ss.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 15th day of February, 1963.

/s/ PATRICIA ANNE DENNY,
Notary Public.

(SEAL)

Reply Affidavit of E. C. Stamatiou in Support of Motion

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

E. C. STAMATIOU, being duly sworn, states on information and belief as follows:

I am the Vice President of Petrol Shipping Corporation, the petitioner herein.

In this matter, the petitioner received a letter dated January 3, 1962 from the Ministry of Commerce of the Greek Government in Athens, the correct English translation of which is as follows:

"Ref. No.—253221/14835

"Re: Aribitrator for SS. *Atlantis*—Damages

"In reference to your letter of December 15, 1961, please be advised that by our letter No. 225568/12562-14/11/61, we have authorized the Greek Government Foreign Trade Administration in Washington, D. C. to nominate our arbitrator.

"We ask you, therefore, kindly to contact above agency."

Thereafter, the petitioner received a letter dated January 9, 1962 from the Office of the Foreign Trade Administration of the Ministry of Commerce in Washington as follows:

"Petrol Shipping Corporation
80 Broad Street
New York 4, N. Y.

"Attention: Mr. John L. Maroudis

"Re: s/ t *Atlantis*—C/P 2/12/60
Bottom Damage in berth at Piraeus
Greece—March 28, 1960

Reply Affidavit of E. C. Stamatiou in Support of Motion

"Gentlemen:

"Our principals, the Ministry of Commerce, State Purchase Directorate has referred to us your request to arbitrate your asserted $286,792.93 claim for grounding damages which you contend is for account of our principals.

"In order that we may become familiar with the validity of your claim and proceed forthwith, we would appreciate your promptly advising us the reason why you consider we should be held responsible for these charges."

Subsequent to the arrival of the *Atlantis* in Piraeus, Greece, the charterer filed a suit against the petitioner for an alleged damage suffered by the cargo in its carriage. This suit was instituted by the Ministry of Finance, acting for the Greek Government. That suit was later dropped, according to advices from the attorney acting for the vessel and the vessel underwriters.

E. C. STAMATIOU
E. C. Stamatiou

Sworn to before me this 18th day of February, 1963.

SIGMUND FAUST
Notary Public, State of New York
No. 31-1173750
Qualified in New York County
Commission Expires March 30, 1963

Shipowner's Exhibit B-1.

The letter of the Greek Ambassador requesting Sovereign Immunity of the State Department.

No. 5108/N/6.

The Ambassador of Greece presents his compliments to His Excellency Secretary of State and, on instructions from the Royal Government, has the honor to submit herewith to His Excellency's kind consideration a memorandum on a legal dispute between the Greek Government and Petrol Shipping Corporation, Delaware.

The Ambassador of Greece avails himself of this opportunity to renew to His Excellency the Secretary of State the assurances of his highest consideration.

September 30, 1964.

MEMORANDUM

(attached to the Note No. 5108/N/6 dated September 29, 1964, of the Royal Greek Embassy in Washington, D. C.)

The proceedings of the United States Courts in the dispute between Greece and Petrol Shipping Corporation, a Delaware Corporation, which arised from the acts taken by an agency of the Greek Government in Piraeus, Greece, are summarized as follows:

On January 14, 1963, Petrol Shipping Corporation, as owner of the tanker "Atlantis", petitioned the United States District Court for the Southern District of New York in No. 63 Civ. 142 for an order *directing* the Kingdom of Greece, Ministry of Commerce, Purchase Directorate, as charterer of said vessel, to proceed to arbitration of a dispute under the charter arising from the carriage from Houston, Texas to Piraeus, Greece, of a cargo of bulk grain financed by the United States Government under Title I

Shipowner's Exhibit B-1.

under Public Law 480. Petrol Shipping Corporation alleged that the "berth (in the port of Piraeus, Greece) designated by the (Kingdom of Greece, Ministry of Commerce, Purchase Directorate) was not at which the vessel could properly and safely lie afloat and as a result thereof the vessel suffered severe and serious damage."

On February 18, 1963, the Ambassador of Greece in the United States appeared specially solely for the purpose of informing said court that the Kingdom of Greece is a sovereign state not subject to suit in said court without its consent which in this case it declined to accord. The Ambassador suggested that the said court lacked jurisdiction over the subject matter of the action and over the Kingdom of Greece or its property and respectfully prayed for an order dismissing the action for lack of jurisdiction.

On February 21, 1963, Honorable Orchie O. Dawson, United States District Judge, ordered that the Petition of Petrol Shipping Corporation be dismissed for lack of jurisdiction by reason of the sovereign immunity of the Kingdom of Greece.

On January 7, 1964, a panel of the Court of Appeals for the Second Circuit affirmed the judgment of the District Court dismissing the Petition of Petrol Shipping Corporation for lack of jurisdiction by reason of the sovereign immunity of Greece.

On May 25, 1964, the Court of Appeals for the Second Circuit sitting in banc on rehearing vacated the judgment of dismissal of the District Court and remanded the case to the District Court for further proceedings.

On August 12, 1964, the Honorable Sylvester J. Ryan, United States District Court Judge, ordered that the Kingdom of Greece and Petrol Shipping Corporation are "hereby directed to appear before the Honorable Wilfred Feinberg on October 5, 1964 and on such subsequent dates as Judge Feinberg shall direct."

On the 10th day of September, 1964, Judge Feinberg requested that counsel for the Kingdom of Greece and for

Shipowner's Exhibit B-1.

Petrol Shipping Corporation appear in his chambers for a pre-trial hearing on September 21, 1964. After the pre-trial hearing on September 21, 1964, Judge Feinberg adjourned further proceedings in the case until November 2, 1964, on order to allow the Kingdom of Greece an opportunity to obtain the views of the Department of State concerning the jurisdictional issues presented in the case. Attached hereto is a copy of the order of Judge Feinberg adjourning the Court's hearing of the case until November 2, 1964.

The assertion of personal jurisdiction by the United States courts over the Kingdom of Greece is contrary to established principles of international law governing the comity of nations.

1. The Kingdom of Greece protests the attempt to serve process of the courts of the United States upon the diplomatic representatives of the Kingdom of Greece. The attempt to serve process in this case was made by mailing copies of the notice of motion and petition of Petrol Shipping Corporation to the Ministry of Commerce, State Purchase Directorate of the Kingdom of Greece, c/o the Greek Government Foreign Trade Administration, 2211 Massachusetts Avenue, N. W., Washington, D. C. and to 30 Rockefeller Plaza, New York 20, New York.

The diplomatic representatives of the Kingdom of Greece to the United States cannot be regarded as "agents" of the Kingdom of Greece for the purpose of accepting service of process in personal suits against the Kingdom of Greece in the courts of the United States. This principle of international law has been expressed by the Department of State to the United States Court of Appeals for the District of Columbia in the suit of *Hellenic Lines, Limited, Appellant* v. *Luke C. Moore, U. S. Marshal, Appellee* (No. 18,265) in the Supplemental Brief for Appellee filed in August, 1964.

It is requested that the Department of State express to the United States District Court for the Southern District

Shipowner's Exhibit B-1.

of New York sitting in *Petrol Shipping Corporation* v. *Kingdom of Greece, Ministry of Commerce, Purchase Directorate,* the same views it expressed in the *Hellenic Lines* case, namely, that personal service of process of a United States court cannot be made upon the Kingdom of Greece by mailing copies thereof to the diplomatic or other representatives of the Kingdom of Greece situated within the United States.

2. The petition of Petrol Shipping Corporation seeks an order of the United States District Court directing Greece to arbitrate in New York a dispute between Petrol Shipping Corporation and the Kingdom of Greece. The Kingdom of Greece is an independent sovereign state not subject to direction by the courts of the United States. It is requested that the Department of State advise the United States District Court for the Southern District of New York sitting in *Petrol Shipping Corporation* v. *Kingdom of Greece, Ministry of Commerce, Purchase Directorate,* that the Kingdom of Greece is not subject to direction by the courts of the United States without its consent.

3. All of the actions complained of in the pending suit were taken by the agencies of the Kingdom of Greece within the territory of the Kingdom of Greece. Petrol Shipping Corporation alleges that its vessel was damaged by an act of an agency of the Kingdom of Greece which, in the Port of Piraeus, directed the vessel to a berth that Petrol Shipping Corporation alleges was unsafe. Under established principles of international law the courts of the United States cannot sit in judgment of the acts of the Kingdom of Greece done within its own territory.

It is requested that the Department of States express to the United States District Court for the Southern District of New York in *Petrol Shipping Corporation* v. *Kingdom of Greece, Ministry of Commerce, Purchase Directorate* that the Kingdom of Greece is not required to answer

in the courts of the United States for actions which it took within its own territory in the port of Piraeus, Greece.

4. Under the laws of the Kingdom of Greece the courts of the Kingdom of Greece are open to Petrol Shipping Corporation for the purpose of seeking an adjudication of its alleged claim against the Kingdom of Greece. It is the view of the Greek Government that the adjudication of Petrol Shipping Corporation's claim should take place in the Kingdom of Greece where all acts complained of took place and where all witnesses of such acts are readily available to aid the true and just adjudication of the claim of Petrol Shipping Corporation.

The Government of Greece is of the opinion that the claim of Petrol Shipping Corporation lacks any basis in fact or in law. Suit was brought against the Kingdom of Greece in New York only for the purpose of seeking a determination of the dispute between Greece and Petrol Shipping Corporation in a place far distant from the scene of the acts complained of and far distant from the port of Piraeus, Greece where all of the witnesses on behalf of the Kingdom of Greece are readily available, thereby placing the Kingdom of Greece at substantial disadvantage in defending an unfounded claim.

Accordingly, it is requested that the Department of State assist the Government of Greece in seeking dismissal of the said suit of Petrol Shipping Corporation by the United States District Court for the Southern District of New York.

Shipowner's Exhibit B-3.

The Reply of the State Department.

The Secretary of State presents his compliments to the Chargé d'Affaires ad interim of Greece and refers to the Ambassador's note No. 5108/N/6 dated September 30, 1964, requesting consideration of an attached Memorandum concerning the case of *Petrol Shipping Corporation* (Petitioner) v. *The Kingdom of Greece, Ministry of Commerce, Purchase Directorate* (Respondent), now pending in the United States District Court for the Southern District of New York.

The basic facts appear to be: that the respondent chartered the petitioner's tanker "Atlantis" to carry grain from Houston, Texas to Piraeus, Greece, the grain having been financed by the United States Government under Title I, Public Law 480; that the berth in the port of Piraeus, Greece, designated by the respondent was not one at which the vessel could properly and safely lie afloat and as a result thereof the vessel suffered damage; and that the charter party contained an arbitration clause and petitioner seeks an order directing the respondent to proceed to arbitration in accordance therewith. The District Court pursuant to an application of the respondent granted an adjournment of the case to permit respondent to present a claim of foreign sovereign immunity to the Department of State. The Memorandum makes several requests, the net effect of which is for recognition of sovereign immunity from suit for the respondent.

As the Embassy is probably aware, it is the practice of the Department of State when considering requests for recognition of sovereign immunity from suit by foreign governments to follow the policy set forth in its letter of May 19, 1952, to the Acting Attorney General, the so-called Tate letter, a copy of which is enclosed. Applying that policy to the facts in the case under consideration, the Department sees no basis for any conclusion other than that the acts on which the suit is based are private acts

Shipowner's Exhibit B-3.

(*jure gestionis*). In these circumstances, the Department regrets that it is unable to comply with the request of the Ambassador of the Kingdom of Greece for recognition of sovereign immunity from suit in the instant case.

It follows that the other questions raised by the Memorandum attached to the Ambassador's note are matters for the Court.

Enclosure:

To Acting Attorney General,
May 19, 1952.

Department of State,
Washington,

TP 12 US-GREECE

DEPARTMENT OF STATE
Washington

May 19, 1952

My dear Mr. Attorney General:

The Department of State has for some time had under consideration the question whether the practice of the Government in granting immunity from suit to foreign governments made parties defendant in the courts of the United States without their consent should not be changed. The Department has now reached the conclusion that such immunity should no longer be granted in certain types of cases. In view of the obvious interest of your Department in this matter I should like to point out briefly some of the facts which influenced the Department's decision.

Shipowner's Exhibit B-3.

A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*). There is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (displomatic and perhaps consular property excepted) or with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary.

The classical or virtually absolute theory of sovereign immunity has generally been followed by the courts of the United States, the British Commonwealth, Czechoslovakia, Estonia and probably Poland.

The decisions of the courts of Brazil, Chile, China, Hungary, Japan, Luxembourg, Norway and Portugal may be deemed to support the classical theory of immunity if one or at most two old decisions anterior to the development of the restrictive theory may be considered sufficient on which to base a conclusion.

The Honorable

PHILIP B. PERLMAN,
Acting Attorney General.

[Published in *Department of State Bulletin*, Vol. 26, pp. 984-5, June 23, 1952.]

Shipowner's Exhibit B-3.

The position of the Netherlands, Sweden and Argentina is less clear since although immunity has been granted in recent cases coming before the courts of those countries, the facts were such that immunity would have been granted under either the absolute or restrictive theory. However, constant references by the courts of these three countries to the distinction between public and private acts of the state, even though the distinction was not involved in the result of the case, may indicate an intention to leave the way open for a possible application of the restrictive theory of immunity if and when the occasion presents itself.

A trend to the restrictive theory is already evident in the Netherlands where the lower courts have started to apply that theory following a Supreme Court decision to the effect that immunity would have been applicable in the case under consideration under either theory.

The German courts, after a period of hesitation at the end of the nineteenth century have held to the classical theory, but it should be noted that the refusal of the Supreme Court in 1921 to yield to pressure by the lower courts for the newer theory was based on the view that that theory had not yet developed sufficiently to justify a change. In view of the growth of the restrictive theory since that time the German courts might take a different view today.

The newer or restrictive theory of sovereign immunity has always been supported by the courts of Belgium and Italy. It was adopted in turn by the courts of Egypt and of Switzerland. In addition, the courts of France, Austria and Greece, which were traditionally supporters of the classical theory, reversed their position in the 20's to embrace the restrictive theory. Rumania, Peru and possibly Denmark also appear to follow this theory.

Furthermore, it should be observed that in most of the countries still following the classical theory there is a school influential writers favoring the restrictive theory

and the views of writers, at least in civil law countries, are a major factor in the development of the law. Moreover, the leanings of the lower courts in civil law countries are more significant in shaping the law than they are in common law countries where the rule of precedent prevails and the trend in these lower courts is to the restrictive theory.

Of related interest in this question is the fact that ten of the thirteen countries which have been classified above as supporters of the classical theory have ratified the Brussels Convention of 1926 under which immunity for government owned merchant vessels is waived. In addition the United States, which is not a party to the Convention, some years ago announced and has since followed, a policy of not claiming immunity for its public owned or operated merchant vessels. Keeping in mind the importance played by cases involving public vessels in the field of sovereign immunity, it is thus noteworthy that these ten countries (Brazil, Chile, Estonia, Germany, Hungary, Netherlands, Norway, Poland, Portugal, Sweden) and the United States have already relinquished by treaty or in practice an important part of the immunity which they claim under the classical theory.

It is thus evident that with the possible exception of the United Kingdom, little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity. There are evidences that British authorities are aware of its deficiencies and ready for a change. The reasons which obviously motivate state trading countries in adhering to the theory with perhaps increasing rigidity are most persuasive that the United States should change its policy. Furthermore, the granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the Government of the United States in subjecting itself to suit in these same courts in both contract and tort and with its long estab-

Shipowner's Exhibit B-3.

lished policy of not claiming immunity in foreign jurisdictions for its merchant vessels. Finally, the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations.

In order that your Department, which is charged with representing the interests of the Government before the courts, may be adequately informed it will be the Department's practice to advise you of all requests by foreign governments for the grant of immunity from suit and of the Department's action thereon.

Sincerely yours,

For the Secretary of State:

JACK B. TATE
Acting Legal Adviser

Shipowner's Exhibit B-2.

Letter, Dated October 5, 1964.

October 5, 1964.

Office of the Secretary of State
Department of State
Washington, D. C.

Attention of Raymond T. Yingling, Esq., Legal Adviser

Re: Petrol Shipping Corporation—Kingdom of Greece, Ministry of Commerce, Purchase Directorate.

Dear Sirs:

We confirm our advices that we represent Petrol Shipping Corporation, a corporation organized under the laws of the State of Delaware, which has instituted a proceeding in the United States District Court for the Southern District of New York to compel the Ministry of Commerce, Purchase Directorate, of the Kingdom of Greece, to comply with its agreement, contained in a Charter Party executed in the United States, to arbitrate a dispute involving damage suffered to the Tanker *Atlantis*.

We have received a copy of the documents dated September 30, 1964, submitted by the Ambassador of Greece to the Secretary of State, purporting to set forth the facts involved, with a request that the Secretary of State assist the Ambassador of Greece in his efforts to have the aforementioned proceeding in the United States District Court dismissed. We submit that the facts in this case clearly demonstrate that the same involve a purely commercial transaction and therefore the request by the Ambassador of Greece for intervention by the Secretary of State should properly be denied.

The dispute arises out of a commercial Charter for a United States vessel, entered into in the United States,

Shipowner's Exhibit B-2.

for the carriage of cargo from a United States port to Greece. The vessel suffered damage as a result of an unsafe berth being furnished to the vessel. The Charter contains a specific agreement by the Kingdom of Greece to arbitrate in New York any disputes arising under the Charter, and that the determination of the arbitrators shall be made a rule of Court. This clearly is a pure and simple commercial transaction and therefore, in accordance with the applicable International Law and the principles previously outlined by the Department of States in the "Tate" letter, the plea of sovereign immunity should be denied.

The Ambassador of Greece, in the memorandum referred to above, attempts to avail himself a ruling in *Hellenic Lines Limited* v. *Luke C. Moore, U. S. Marshal,* presently on appeal in the United States Court of Appeals for the District of Columbia, as a basis for intervention by the Secretary of State. We respectfully submit that the *Hellenic Lines* case is in no way controlling on this particular case, since in the *Hellenic Lines* case there was no agreement to arbitrate disputes or submit to jurisdiction of a United States Court. Thus, the question of service of process is not a true issue in our case, and in support thereof we refer to the recent decision of the United States Court of Appeals for the Second Circuit in *Victory Transport Incorporated* v. *Comisaria General De Abastecimientos Y Transportes,* a copy of which is enclosed for your convenience.

The Second Circuit in the foregoing case, which is analogous on its facts to this case, has sustained jurisdiction over a Department of the Spanish Government and required it to proceed with arbitration as agreed in a Charter Party, stating as follows on the issue of service of process:

> "The appellant has also challenged the propriety of the extraterritorial service employed here. But since the appellant has consented beforehand to the

Shipowner's Exhibit B-2.

jurisdiction of the district court, the sole function of process in this case was, as Judge Murphy correctly noted below, to notify the appellant that proceedings had commenced. This function was certainly performed. Moreover, similar service of process on nongovernmental foreign corporations was held sufficient in the *Farr* and *Orion* cases, *supra*. No rule of International law requires special treatment for serving branches of foreign sovereigns. See *Sucharitkul, supra,* at 350, 351."

We see no need in view of the foregoing to bring to the attention of the Secretary of State the additional facts which are in conflict with statements contained in the memorandum submitted by the Ambassador of Greece, since we respectfully submit that based upon the foregoing the Secretary of State should decline the request by the Ambassador of Greece to intervene in this proceeding. However, in the event the request is not summarily declined, then we request an opportunity to be heard so that we may submit such additional facts and arguments as we deem appropriate.

Very truly yours,

HILL, BETTS, YAMAOKA, FREEHILL & LONGCOPE

By /s/ ELI ELLIS

EE:G

Shipowner's Exhibit B-4.

Letter, Dated October 15, 1964.

DEPARTMENT OF STATE

WASHINGTON

October 15, 1964

In reply refer to
L/SFP

HILL, BETTS, YAMAOKA, FREEHILL & LONGCOPE,
26 BROADWAY,
NEW YORK, NEW YORK.

Sirs:

In response to your letter of October 5, 1964, indicating your interest as representatives of the petitioner in *Petrol Shipping Corporation* v. *Kingdom of Greece, Ministry of Commerce, Purchase Directorate,* in the request of the Ambassador of Greece for recognition of sovereign immunity from suit of the respondent in the said case, you are informed that the Department has declined to recognize such immunity because in its view the acts out of which the case arises must be regarded under the restrictive theory of sovereign immunity followed by the Department as private acts (*jure gestionis*).

Very truly yours,

For the Secretary of State:

s/ RAYMOND T. YINGLING
Assistant Legal Adviser

Letter to Court, Dated November 18, 1964.

November 18, 1964

118982-106

DEPARTMENT OF JUSTICE.

Honorable WILFRED FEINBERG
United States District Judge
United States Court House
Foley Square
New York, New York 10007

Dear Judge Feinberg:

This has reference to your letter of November 2 concerning *Petrol Shipping Corp.* v. *Greece* (S. D. N. Y. 63 Civ. 142).

The Department has carefully considered your invitation to submit an *amicus curiae* brief in this litigation. As you know, we filed such a brief in this case before the Court of Appeals, at the request of that court. Following the remand of this case by the Court of Appeals, that court rendered its decision in *Victory Transport, Inc.* v. *Comisaria General* (No. 28636, September 9, 1964), which involves circumstances that appear to be identical to those of the present case. Accordingly, the discussion in that case concerning sovereign immunity would seem to be applicable here and to govern this case.

The Department having expressed its views in the Court of Appeals brief and that court having authoritatively spoken on the subject of sovereign immunity in the *Victory Transport* case, I am of the opinion that this Department could add nothing that would be of constructive assistance to this Court.

Sincerely yours,

s/ JOHN W. DOUGLAS
Assistant Attorney General

cc: State Department
Arthur Beck, Esq.
Eli Ellis, Esq.

Letter, Dated May 4, 1964.

BECKER & GREENWALD

Attorneys at Law

839 - 17th Street, N. W.
Washington 6, D. C.

—

Sterling 3-8775

—

Cable "Becker"

May 4, 1964

Our File No. 190.2

The Honorable, the Judges of the United States
Court of Appeals for the Second Circuit

United States Courthouse
Foley Square
New York, New York 10007

Re: Petrol Shipping Corporation *v.* The Kingdom of Greece, Ministry of Commerce, Purchase Directorate No. 28188, on rehearing *in banc*

Dear Sirs:

The order of this Court dated March 12, 1964, directed that the appeal herein be reconsidered *in banc* without further argument. It is respectfully requested that this Court modify its order so as to permit the oral argument of this case for the following reasons:

1. Since this Court's order, the Supreme Court decided (on March 23, 1964) *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. , 11 L. ed 2d 804. We respectfully suggest that it might be helpful to this Court if the impact of that decision upon this case were argued orally.

Letter, Dated May 4, 1964.

2. The Government, in its brief as *amicus curiae,* took a position different from that taken by either of the parties hereto (see Government brief, pages 4-5) and the Government suggested that this case be remanded, a suggestion not made by either party. We think that it would likewise be helpful to this Court if the Government's position were made on oral argument and subject to oral refutation or rebuttal.

3. We had not previously urged that this case should be dismissed because of improper service, although the point of the propriety of service was raised by appellant in its reply brief (pages 2-4), refuted by appellee in its supplemental brief (pages 2-6) and considered by the panel of this Court who heard the case (Per Curiam opinion of January 7, 1964, note 2). Since the appellee's brief filed herewith now asks affirmance of the judgment of the District Court because of improper service, we think that this contention should likewise be made on oral argument.

For these reasons we respectfully request that the rehearing herein be set down for oral argument.

A copy of this letter has been sent to Government counsel and to counsel for the appellant.

Respectfully yours,

s/ Arthur M. Becker
Arthur M. Becker
Counsel for Appellee,
appearing specially

Stipulation.

UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER *of* The Petition of PETROL SHIPPING CORPORATION as Owner of the Tanker *Atlantis*, for an order directing the KINGDOM OF GREECE, MINISTRY OF COMMERCE, PURCHASE DIRECTORATE, Charterer of said vessel, to proceed to arbitration in accordance with the terms of its written agreement.	63 Civ. 142

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned proctors for the respective parties that the motion of Petrol Shipping Corporation, Vessel-Owner-Petitioner, for an Order directing the Kingdom of Greece, Ministry of Commerce, Purchase Directorate, to proceed to arbitration in accordance with the terms of its Agreement, returnable at a Stated Term for the hearing of motions in this Court on January 29, 1963, at 10 o'clock in the forenoon, be and the same hereby is adjourned to February 5, 1963, at the same time and place.

Dated: New York, N. Y.
January 28, 1963.

HILL, BETTS, YAMAOKA, FREEHILL & LONGCOPE,
Proctors for Petrol Shipping Corporation,
Vessel-Owner-Petitioner.

/s/ BECKER & GREENWALD
Proctors for the Kingdom of Greece, Ministry of Commerce, Purchase Directorate.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 489

KINGDOM OF GREECE, MINISTRY OF COMMERCE, PURCHASE DIRECTORATE, *Petitioner,*

v.

PETROL SHIPPING CORPORATION, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

ARTHUR M. BECKER
1701 Pennsylvania Ave., N. W.
Washington, D. C. 20006
Counsel for Petitioner.

Of Counsel:

NIXON, MUDGE, ROSE,
GUTHRIE & ALEXANDER
20 Broad Street
New York, New York

September 23, 1966.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 489

KINGDOM OF GREECE, MINISTRY OF COMMERCE, PURCHASE DIRECTORATE, *Petitioner,*

v.

PETROL SHIPPING CORPORATION, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITIONER'S REPLY BRIEF

Significantly, the respondent's Brief in Opposition makes no attempt to defend the ruling that the Second Circuit has power to promulgate its own *ad hoc* rule of *in personam* service in a situation where Rule 4 of the Federal Rules of Civil Procedure is silent. Nor does the respondent deny that the decision as rendered

fully warrants the consideration of this Court. Instead, respondent objects to the grant of certiorari by confusing the ruling on service with questions of sovereign immunity and consent to jurisdiction and making a belated claim of waiver of objections to service.

By opposing certiorari on grounds quite unrelated to the ruling respecting *in personam* service and to the questions and considerations advanced in the Petition, the respondent would have this Court ignore a most questionable precedent. That opinion, if left unreviewed by this Court, can generate serious intrusions upon this Court's rule-making power as well as embarrassments in the judicial and executive relationships with friendly foreign sovereigns. Such a ruling deserves the invocation of this Court's certiorari powers.

The appropriateness of the grant of certiorari is in no measure diluted by the irrelevant points advanced in the Brief in Opposition:

1. The Sovereign Immunity and Jurisdiction Points

Points I and II of the Brief in Opposition advance the contentions that (1) the Kingdom of Greece has no cognizable sovereign immunity with respect to a commercial transaction, and (2) jurisdiction was created by the agreement to arbitrate and hence service was necessary only for the purpose of notice—which purpose was here performed.

But the Second Circuit in its opinion below held those contentions irrelevant to its own determination of the propriety or availability of service under Rule 4 of the Federal Rules of Civil Procedure. As to the sovereign immunity contention, the Second Circuit

properly noted (Pet. App. 4a-5a), quoting from the *amicus* brief of the United States, that only after jurisdiction over a sovereign has been acquired by service of process does the sovereign immunity issue come into consideration. In other words, sovereign immunity "presents a ground for relinquishing the jurisdiction previously acquired" (Pet. App. 5a) through such means as proper service of process. Hence the question of service must first be resolved quite apart from sovereign immunity considerations. As was said in *Oster* v. *Dominion of Canada,* 144 F. Supp. 746, 749 (N.D.N.Y.), aff'd per curiam, 238 F. 2d 400 (C.A. 2), cert. denied. 353 U.S. 936:

> "It is beyond argument that jurisdiction of the person in this type of action is a necessary requisite to the overall jurisdiction of the Court to adjudicate the claim submitted. Such jurisdiction must be acquired either by service of process or by the defendant's appearance. *Ex parte Péru,* 318 U.S. 578, at page 587. Here the defendant has not appeared in any manner in these actions and a consideration of the effect of a holding that service upon a consul is service upon a sovereign is sufficient to conclude that the service of process here is ineffective to obtain jurisdiction over the person of the defendant.
>
> "Having arrived at the above conclusion, it would seem unnecessary to discuss and decide whether or not the immunity, ordinarily granted to a friendly sovereign, is available to the defendant in these cases. The determination of that question is not essential to this decision. . . ."

As to the jurisdictional claim, the Second Circuit properly held that "regardless, however, of what theory makes the Purchase Directorate present, service must be adequate." Pet. App. 6a. And service

must be adequate, as the court recognized, under the Federal Rules of Civil Procedure. Service under Rule 4 is made mandatory by Section 4 of the United States Arbitration Act, pursuant to which petitioner brought this action. Thus the question as to service must be considered and resolved independently of the jurisdictional factors. A court can exercise whatever jurisdiction it may have only after the defending party is properly served and brought before it.

The element of service is of necessity the primary and the critical element in this case, the element which was recognized as such by the Second Circuit and which occupied so much of its discussion in the opinion. That is the element, in terms of its treatment by the Second Circuit, that justifies the grant of certiorari.

2. The Waiver Point

Point III of the Brief in Opposition asserts that objections to service of process have long ago been waived by the petitioner. The short answer is that the Second Circuit, confronted with precisely that contention from the respondent, ignored it completely and proceeded to resolve the merits of the service of process issue.

Actually, of course, the service issue was never waived. From the earliest part of this litigation, when the Kingdom of Greece appeared specially to protest the assertion of jurisdiction over it, the propriety of service has never been conceded. The service issue came into sharp focus following the Second Circuit's *en banc* remand of the case to the District Court to take testimony, hear arguments and make a deter-

mination on precisely this question.[1] In the District Court, the parties stipulated the pertinent facts relative to the service of the petition to compel arbitration upon the petitioner, indicating that the three mailings specified in the Petition, pp. 6-7, had been made. Then, by direction of the District Court, memoranda were submitted by the parties respecting the validity of the service thus made. And the District Court then ruled on the merits of the claim that service was invalid.[2]

It was on the basis of this fully developed, stipulated record that the Second Circuit reviewed the ruling of the District Court respecting the adequacy of service and then proceeded to promulgate its own *ad hoc* rule of service to justify the "service" here effectuated. But it was not until the case reached the Second Circuit on this last occasion that the respondent for the first time raised any contention of waiver.

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[1] The Second Circuit, sitting *en banc* upon respondent's rehearing petition and acting upon consideration of the additional briefs filed by the parties, remanded the case to the District Court "with instructions to take such evidence as is relevant to the contentions of the parties and to make a further determination in the light thereof and the arguments made thereon by the parties." 332 F. 2d at 370; Pet. App. 21a. One of the contentions raised by petitioner in its brief on rehearing, which was among those prompting this remand, was the claim (pp. 10-14 of brief) that the Kingdom of Greece had not been lawfully served with process in this case.

[2] This trial of the service question, achieved through the consent and stipulation of the respondent, eliminated any possible argument that petitioner's earlier pleadings constituted a waiver of the service issue. Rule 15(b) of the Federal Rules of Civil Procedure provides that when issues not raised in the pleadings "are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Thus the trial of the service issue precludes any claim of waiver in these circumstances. See *Joyce* v. *L. P. Steuart, Inc.*, 227 F. 2d 407 (App. D.C.); *Gibbs* v. *Randolph*, 250 F. 2d 41 (C.A. 5).

That contention was pointedly and completely ignored by the Second Circuit as it proceeded to resolve the service issue on its merits. Faced with so complete a stipulated record on the service issue, the Second Circuit had no alternative but to ignore any claim of waiver by a party who had joined in creating the record on the issue. The assertion of the waiver claim in this Court deserves no different treatment.

Only a word need be added concerning respondent's assertion (Opp. Br. 11-13) that entering into certain stipulations on behalf of the petitioner concerning extensions of the return date of the original motion constituted a general appearance and a waiver of service objections pursuant to Rule 12(h). The distinction between general and special appearances is no longer meaningful in federal practice. Professor Moore has stated (2 Moore's Federal Practice, ¶12.12 at 2263-2264, 2d ed., 1964):

> "A voluntary appearance does not waive the objection of lack of jurisdiction over the person. Obtaining extensions of time and taking depositions before answering have been held not to constitute a waiver of the defenses of lack of jurisdiction of the person and improper venue."

In sum, the respondent's belated waiver contention is invalid and cannot serve as a means of avoiding the real and substantial issues of service created by the decision of the Second Circuit.

CONCLUSION

The fact that the respondent has found it impossible to defend the ruling of the Second Circuit only underscores the appropriateness of a grant of certiorari for the reasons expressed in the Petition. Respondent's

unsupported assertion (Opp. Br. 5-6) that there has been no showing of any conflict is completely refuted by the Second Circuit's own statement (Pet. App. 11a) that it was "not disposed to follow" *Purdy Co.* v. *Argentina,* 333 F. 2d 95 (C.A. 7), regarding service on sovereigns under Rule 4. And, as the Petition more fully demonstrates, the decision below must be viewed as in total conflict with the Rules Enabling Act and with this Court's decision in *Miner* v. *Atlass,* 363 U.S. 641, respecting the power to promulgate the rule announced below. Certiorari should accordingly be granted.

Respectfully submitted,

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